

2008

Beyond Theocracy and Secularism (Part I): Toward a New Paradigm for Law and Religion

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27 Miss. C. L. Rev. 159 (2007-2008)

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BEYOND THEOCRACY AND SECULARISM (PART I):
TOWARD A NEW PARADIGM FOR
LAW AND RELIGION

*Mark C. Modak-Truran**

[O]ne of the things a scientific community acquires with a paradigm is a criterion for choosing problems that, while the paradigm is taken for granted, can be assumed to have solutions. To a great extent these are the *only problems* that the community will admit as scientific or encourage its members to undertake. *Other problems*, including many that had previously been standard, are *rejected as metaphysical*, as the *concern of another discipline*, or sometimes as just too *problematic to be worth the time*.¹

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1. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 37 (3rd ed. 1996)(emphasis added).

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I. INTRODUCTION

The continued vitality of religion in modern society has motivated many scholars to revisit their assumptions about how religion relates to their disciplines in ways which dramatically call into question the prevailing paradigms defining that relationship. In sociology and religion,² scholars are revisiting, revising, or rejecting the paradigmatic assumption that the modernization of society necessarily leads to the secularization of society.³ Scholars in anthropology,⁴ political science,⁵ international relations,⁶ and

2. See, e.g., JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON* (1990); JEFFREY STOUT, *DEMOCRACY & TRADITION* 97 (2004) (arguing that a secularized modern democratic discourse does not “involve endorsement of the ‘secular state’ as a realm entirely insulated from the effects of religious convictions, let alone removed from God’s ultimate authority. It is simply a matter of what can be presupposed in a discussion with other people who happen to have different theological commitments and interpretive dispositions.”).

3. See, e.g., STEVE BRUCE, *GOD IS DEAD: SECULARIZATION IN THE WEST* (2002) (defending the secularization thesis); JOSÉ CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994) [hereinafter CASANOVA, *PUBLIC RELIGIONS*] (challenging the privatization of religion but revising the other main postulates of the secularization thesis); Peter L. Berger, *The Desecularization of the World: A Global Overview*, in *THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS* 2 (Peter L. Berger ed., 1999) [hereinafter Berger, *Desecularization of the World*] (characterizing prior belief in secularization theory— “[m]odernization necessarily leads to a decline of religion, both in society and in the minds of individuals”—as “mistaken”); José Casanova, *Rethinking Secularization: A Global Comparative Perspective*, 8 *HEDGEHOG REV.* 7 (2006) [hereinafter Casanova, *Rethinking Secularization*] (clarifying and revising secularization thesis).

4. See, e.g., TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003).

5. See, e.g., PIPPA NORRIS & RONALD INGLEHART, *SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE* (2004) (empirically defending the secularization thesis); CHARLES TAYLOR, *A SECULAR AGE* (2007) (arguing that the “conditions of belief” have shifted from “a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others”); CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 194 (2004) (arguing that “[m]odernity is secular, not in the frequent, rather loose sense of the word, where it designates the absence of religion, but rather in the fact that religion occupies a different place, compatible with the sense that all social action takes place in profane time.”); Charles Taylor, *Modes of Secularism*, in *SECULARISM AND ITS CRITICS* 31, 46, 51-53 (Rajeev Bhargava ed., 1998) (arguing that “secularism in some form is a necessity for democratic life of religiously diverse societies” and proposing a new kind of secularism based on a revised Rawlsian notion of overlapping consensus.)

6. See, e.g., SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996); Samuel Huntington, *The Clash of Civilizations?*, in *THE CLASH OF CIVILIZATIONS?: THE DEBATE* 1, 4 (1996) (arguing that “[t]he clash of civilizations will dominate global politics” in part because of the fundamental differences among the seven or eight major civilizations that “are

philosophy⁷ have also joined in the debate about secularization and the changing role of religion in modern society and in their disciplines. For instance, in *Philosophy and the Turn to Religion*, philosopher Hent De Vries begins his book by claiming: “That religion can no longer be regarded as a phenomenon belonging to a distant past, and that it is not a transhistorical and transcultural phenomenon either, is no longer disputed in modern scholarship.”⁸

Despite these important developments in other disciplines, the secularization of law arguably constitutes the most widely-held but least-examined assumption in contemporary legal theory. Almost without question,⁹ the contemporary consensus assumes the modern paradigm of the separation of law and religion and a secular foundation for law. In France, for example, the doctrine of *laïcité* requires secular solidarity (i.e., secularism) to take priority over religious freedom by prohibiting children from wearing headscarves or religious symbols in public schools.¹⁰ From the perspective of the modern paradigm, religion constitutes “a special kind of problem for the law” not a source of legitimation or justification.¹¹ The “Law” determines the station or location of religion rather than the other way around. In the United States, the Establishment Clause of the First Amendment¹² determines when and where religion can play a role in public life, and the Free Exercise Clause determines when religious activity will be protected from impingement by other laws. Except for debates regarding how the law should locate religion, contemporary legal theorists spend little or no time considering the relationship between religion and

differentiated from each other by history, language, culture, tradition and, *most important, religion.*” (emphasis added).

7. See, e.g., JACQUES DERRIDA, *ACTS OF RELIGION* (Gil Anidjar ed., 2002); RELIGION (Jacques Derrida & Gianni Vattimo eds., 1996); RICHARD RORTY & GIANNI VATTIMO, *THE FUTURE OF RELIGION* (Santiago Zabala ed., 2005).

8. HENT DE VRIES, *PHILOSOPHY AND THE TURN TO RELIGION* 1 (1999).

9. *But see* MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS* (2007) (arguing for a religious ground for human rights); Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision Making*, 53 CATH. U. L. REV. 709 (2004) [hereinafter Modak-Truran, *Reenchanting the Law*] (arguing that the indeterminacy of United States law requires judges to rely on religious or comprehensive convictions to justify their deliberation about hard cases fully, even though they can only provide a partial justification of their decisions in their written opinions in terms of noncomprehensive legal norms because of the Establishment Clause of the First Amendment.).

10. Article 2 of the French Constitution provides that “France is a republic, indivisible, *secular*, democratic and social. . . .” ROBERT L. MADDEX, *CONSTITUTIONS OF THE WORLD* 84 (1995) (emphasis added).

11. Steven D. Smith, *Legal Discourse and The De Facto Disestablishment*, 81 MARQ. L. REV. 203, 212-13 (1998) (arguing that “religion is not viewed as a resource or a potentially helpful approach to understanding the day-to-day issues of law” like “economics, for instance, or moral and political philosophy, or feminist or critical race theory, or history, or (more occasionally) literary theory or sociology or psychology” but as “a special kind of problem for the law”). See also Steven D. Smith, *Recovering (From) Enlightenment?*, 41 San Diego L. Rev. 1263, 1282 (2004) (arguing that “secularization is neither as uniform nor as inexorable as it once seemed, it still dominates some sectors of the culture, especially the academy”)(citing Berger, *Desecularization of the World*, *supra* note 3, at 1-3).

12. The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion” U.S. CONST. amend. I.

the legitimation of law—they presuppose the modern paradigm and its secular foundation for law.¹³

Given the presumed separation of law and religion, contemporary legal theorists appear perplexed by calls for government recognition of a Christian foundation for the state by posting the Ten Commandments, displaying crèches on government property, keeping “under God” in the pledge of allegiance, and allowing prayer and the teaching of intelligent design in public schools.¹⁴ For example, Ronald Dworkin views the recent revival of religious conceptions of the state—in his words “a tolerant religious nation”—as simply “anachronistic.”¹⁵ Most other legal scholars characterize this development as merely proposing a more permissive interpretation of the Establishment Clause rather than an attack on the law’s secular foundation. This interpretation is often referred to as “accommodationist”¹⁶ or “non-preferentialist” and allows government recognition of “religion in general” as long as the government does not prefer one religion over another.¹⁷ Moreover, legal scholars have not seen the proposal for government recognition of the U.S. as a Christian nation or the continued vitality of religion in public life as sufficient reasons for rethinking the modern paradigm’s separation of law and religion.

Non-legal scholars, however, have more vigorously denounced government recognition of the Christian origins of the United States as proposing

13. While the current notions of separation of law and religion are primarily secular, John Witte, Jr. has poignantly argued that “separationism is an ancient Western teaching rooted in the Bible” including roots in both the Hebrew Bible and the New Testament. John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. CHURCH AND STATE 15, 16-17 (2006).

14. See, e.g., *McCreary County v. A.C.L.U.*, 545 U.S. 844 (2005) (holding the display of the Ten Commandments inside courthouses in Kentucky unconstitutional under the Establishment Clause of the First Amendment); *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that the display of the Ten Commandments monument on the grounds of the Texas State Capitol with other monuments did not violate the Establishment Clause of the First Amendment); *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984) (upholding the display of a crèche on government property); *Elk Grove Unified School Dist. v. Newdow*, 328 F.3d 466 (9th Cir. 2003) (reversing for lack of standing the 9th Circuit Court of Appeals holding unconstitutional a U.S. statute inserting the words “under God” into the Pledge of Allegiance and the school district’s policy requiring daily recitation of the Pledge as violations of the Establishment Clause with concurring opinions by Former Chief Justice Rehnquist and Justice O’Connor arguing that there was no violation of the Establishment Clause); *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707, 708-09 (M.D. Pa. 2005) (holding that the required statement in 9th grade biology class that Evolution was merely a theory not a fact and that “Intelligent Design is an explanation of the origin of life that differs from Darwin’s view” violated the Establishment Clause of the First Amendment and freedom of worship provision under the Pennsylvania Constitution.).

15. RONALD DWORGIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* 57 (2006) (making a philosophical argument that a tolerant secular state is superior to a “tolerant religious state” based on “two basic principles of human dignity”).

16. Former Chief Justice Burger argued that the Constitution does not “require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” *Lynch*, 465 U.S. at 673. Burger further characterized these accommodations of religion as “the Government’s acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage.” *Id.* at 677.

17. See, e.g., *Van Orden v. Perry*, 545 U.S. at 692 (J. Scalia dissenting) (arguing “that there is nothing unconstitutional in a State’s favoring *religion generally*, honoring God through public prayer and acknowledgement or, in a nonproselytizing manner, venerating the Ten Commandments”) (emphasis added).

a Christian theocracy.¹⁸ The Iranian Constitution provides an unambiguous example of a theocratic constitution and the pre-modern paradigm of law and religion. Article 4 provides that “[a]ll civil, penal, financial, economic, administrative, cultural, military, political, and other laws [including ‘all articles of the Constitution’] and regulations must be based on *Islamic criteria*.”¹⁹ In light of this example, the charge of theocracy for things like posting the Ten Commandments on government property appears overstated.

Further reflection reveals that in one important respect this charge makes sense. It identifies an implicit presumption that the law is legitimated by a particular religious tradition—typically the “Judeo-Christian tradition”—as specified by the pre-modern legal paradigm. For instance, Former Chief Justice of the Alabama Supreme Court Roy Moore, the “Ten Commandments Judge,”²⁰ maintains that he placed “a two-and-one-half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building. . . . in order to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo-Christian God over both the state and the church.”²¹ Moore’s testimony during the trial further emphasized that the Ten Commandments monument was intended “to acknowledge GOD’s law and GOD’s sovereignty” and “to acknowledge GOD’s overruling power over the affairs of men.”²² Moore’s comments help clarify that under the pre-modern paradigm, religion locates and legitimates the law. Rather than constituting a problem for law, religion provides the fundamental values that are the source of the law. Moreover, while the modern paradigm has dominated

18. The charge of theocracy has been particularly evident in recent popular books and articles about the contemporary political landscape. See, e.g., DAMON LINKER, *THE THEOCONS: SECULAR AMERICA UNDER SIEGE* (2006); MICHELLE GOLDBERG, *KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM* (2006); KEVIN PHILLIPS, *AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY* (2006); JAMES RUDIN, *THE BAPTIZING OF AMERICA: THE RELIGIOUS RIGHT’S PLANS FOR THE REST OF US* (2006); ROSS DOUTHAT, *Theocracy, Theocracy*, *Theocracy*, 165 *FIRST THINGS* 23 (August/September 2006) (discussing most of these books).

19. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, art. 4 (adopted October 24, 1979, and amended July 28, 1989) (available at http://www.servat.unibe.ch/law/icl/ir00000_.html). For an excellent analysis of the Iranian Constitution, see generally Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 *MISS. C. L. REV.* 11 (2008).

20. Former Chief Justice Moore was named the “Ten Commandments Judge” when, as a circuit court judge in Alabama, he refused to remove a plaque of the Ten Commandments that he had placed behind his bench. Two high-profile cases were brought regarding this practice but both were dismissed as non-justiciable. See *Ala. Freethought Ass’n v. Moore*, 893 F. Supp. 1522, 1544 (N.D. Ala. 1995) (finding plaintiffs lacked standing to bring Establishment Clause challenge to Moore’s Ten Commandments); *Alabama ex rel. James v. ACLU*, 711 So.2d 952, 954 (Ala. 1998) (dismissing action by State of Alabama seeking declaratory judgment that Judge Moore’s practices were consistent with Establishment Clause.).

21. *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003) (affirming that the monument violated the Establishment Clause and the order to remove it). The court noted that Moore claimed, like “southern governors who attempted to defy federal orders during an earlier era,” he was not subject to any federal court order below the U.S. Supreme Court. *Id.* at 1302. The Eleventh Circuit, however, affirmed the district courts’ holding that the monument violated the Establishment Clause and their order to remove the monument. *Id.* at 1284.

22. *Id.* at 1287.

Western legal thought since the 17th century, Moore's position and the Iranian Islamic Constitution demonstrate that the pre-modern paradigm still constitutes a live option in the 21st Century.

As part of a larger project challenging and moving beyond the pre-modern and modern paradigms, this article focuses on the modern paradigm and its notion of secularization. Section II will discuss the origin of the modern paradigm as a reaction to the religious pluralism and the religious wars in the sixteenth and seventeenth century such as the Thirty Years War in Europe (1618-48) and the English Civil War (1642-51) resulting from the Protestant Reformation. The Reformation divided the Western part of the Christian tradition into separate confessional institutions based on different theological interpretations of Christianity such as Lutheran, Calvinist, and Anabaptist. The Lutheran, Calvinist, and Anabaptist understandings of the relationship of the church and the state were substantially different from the Roman Catholic understanding. Under the pre-modern paradigm, only one of these understandings of the Christian tradition could legitimate the state. This produced conflict and eventually war among these confessional institutions for control of the state. Faced with religious conflict and devastating religious wars, the modern paradigm attempted to replace the religious legitimation under the pre-modern paradigm with a secular legitimation of law based on the Enlightenment view of reason. The secular legitimation of law under the modern paradigm attempted to separate law and religion into autonomous spheres so that a plurality of religious traditions could coexist within a state.

Contrary to the continuing consensus on the separation of law and religion, my thesis is that two quandaries or crises for legal theory—legal indeterminacy and the ontological gap between legal theory and legal practice—have called into question the modern paradigm and its notion of secularization of the law. To support this thesis, Section III will set forth a definition of religion and religious pluralism and summarize the debate about the secularization of law and its relevance for the modern paradigm. Section IV will show that legal theorists (ranging from extreme-radical deconstructionists to contemporary legal formalists) overwhelmingly agree that the law is indeterminate.²³ The law is indeterminate because there are hard cases where the apparently relevant statutes, common law, contracts, or constitutional law provisions at issue fail to resolve disputes. From a descriptive standpoint, legal indeterminacy merely means that judges must rely on extralegal norms to resolve hard cases. This may result in judges relying on religious norms in contravention to the secularization of the law.

23. The consensus ranges from extreme-radical deconstructionists, such as Anthony D'Amato, who have argued that even the United States constitutional requirement that the President be thirty-five years of age is indeterminate, Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 Nw. U. L. REV. 250 (1989), to contemporary legal formalists, such as Ernest J. Weinrib, who claim that "[n]othing about formalism precludes indeterminacy." Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 1008 (1988).

For example, in a recent empirical study of judicial decision making, Gregory Sisk, Michael Heise, and Andrew Morriss concluded that “religious affiliation variables . . . were the most consistently significant influences on judicial votes in the religious freedom cases included in our study.”²⁴ As suggested by this study, the advent of legal indeterminacy has called into question the secularization of the law as a descriptive assumption.

Legal indeterminacy thus shifts the burden of maintaining the secularization of law to normative theories of law. Within the modern paradigm, these normative theories require judges to justify extralegal norms without relying on religious convictions. Sections V and VI will discuss the main types of liberal and republican normative theories under the modern paradigm—represented by Max Weber, John Rawls, Jürgen Habermas, and French secularism—that attempt to legitimate the law independently of religious or comprehensive convictions. Sections V and VI will also show that these positions fail for several of the following reasons: 1) they deny legal indeterminacy; 2) they are incoherent; or 3) they require establishing a comprehensive secularism in violation of the Establishment Clause.

As indicated in Section IV, Steven D. Smith has also persuasively argued in *Law’s Quandary* that the metaphysical or ontological presuppositions of the practice of law are inconsistent with the presuppositions of contemporary legal theory.²⁵ The practice of law presupposes a classical or religious ontology while contemporary legal theory usually presupposes a scientific ontology (i.e., scientific materialism).²⁶ Smith concludes that this “ontological gap” between the practice of law and legal theory presents “a *metaphysical* predicament” that “will require us to ‘take metaphysics seriously.’”²⁷ Smith’s argument suggests that legal theorists can no longer ignore the issue of metaphysical or ontological presuppositions, but he confesses that he has “no idea what the answer to that question might be.”²⁸

Finally, my conclusion will argue that closing the ontological gap and providing a normative theory of law consistent with legal indeterminacy requires a *desecularization of law* and a return to a religious legitimation of law. Desecularization of the law does not suggest returning to the pre-modern paradigm. The pre-modern paradigm imposes a *de facto* Christian

24. Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 501 (2004). See also RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 120 (2003) (noting “startling correlations” between judicial voting on gay rights and judges’ religious affiliations and arguing that “[v]alues based on personal, including ethnic and religious, background influence judicial decisions not because judges are especially willful but because many cases cannot be decided by reasoning from shared premises of fact and value.”).

25. STEVEN D. SMITH, *LAW’S QUANDARY* xii (2004).

26. *Id.* at 155.

27. *Id.* at 2.

28. *Id.* at 177.

religious foundation on “the world’s most religiously diverse nation,”²⁹ and violates the Establishment Clause. While the detailed argument will have to wait for a subsequent article entitled *Beyond Theocracy and Secularism (Part II): A New Paradigm for Law and Religion*, this article will indicate the trajectory for a new constructive postmodern paradigm of law and religion that embraces legal indeterminacy as a structural characteristic of law which allows for a plurality of religious convictions to implicitly legitimate the law and close the ontological gap. The unitary religious (pre-modern) or secular (modern) legitimation of law appears to be an outdated or erroneous assumption of pre-modern and modern paradigms that fails to take religious pluralism seriously. Rather than proposing a fixed, certain foundation for the law, I will argue that the legitimation of law depends on the plurality of religious and comprehensive convictions in the culture. Under the constructive postmodern paradigm, the text of the law must be explicitly secularized (i.e., no explicit recognition of religion), but at the same time, the law is implicitly legitimated by a plurality of religious foundations. The constructive postmodern paradigm of law and religion thus leads to the *deseccularization of the law*.

II. THE ORIGIN OF THE MODERN PARADIGM: THE PROTESTANT REFORMATION & THE ENLIGHTENMENT

In 1861, Henry Sumner Maine characterized societies under the pre-modern paradigm as “primitive” and maintained that they operated by the “rule of religion” rather than the “rule of law.”³⁰ Maine’s identification of the “rule of law” with the advent of the modern paradigm and its secularization of law dramatically exhibits how deeply held or fundamental the modern paradigm has been to conceptions of law and religion in the West. Despite the pervasiveness of the modern paradigm, its origins in the Protestant Reformation and the Enlightenment still shape many of the assumptions in contemporary jurisprudence.³¹ The shift from the pre-modern to

29. See generally DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS NOW BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION* (2001) (chronicling the increasing diversity of American religious practice and proposing a pluralistic vision for a new America).

30. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 22 (Beacon Press 1970) (1861).

31. Harold Berman’s two volume work clearly provides the best and most comprehensive treatment of the historical influence of religion on law and law on religion in the Western legal tradition. See HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003) [hereinafter BERMAN, *LAW AND REVOLUTION II*]; HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 165 (1983) [hereinafter BERMAN, *LAW AND REVOLUTION I*]. By contrast, the historical account in Section II should not be taken to suggest a definitive historical account that could rival legal historians like Berman. Rather, this account intends to isolate some of the key historical influences—the Protestant Reformation (including the subsequent wars of religion) and the Enlightenment—that motivated an eventual change to the modern paradigm. Also, the identification of paradigms as—pre-modern, modern, and postmodern—should not be taken to be neatly correlated to certain historical parameters. These labels attempt to identify key assumptions about law and religion and indicate generally that they had prominence during certain periods. For example, the introduction indicated that the pre-modern paradigm is still advocated by some like Former Chief Justice Roy Moore even though the modern

the modern paradigm arguably resulted from religious conflict and wars of religion set off by the Reformation. These religious wars presented a crisis for the pre-modern paradigm and motivated a re-conceptualization of law—the modern paradigm of law and religion. The modern paradigm provided a secular foundation based on Enlightenment rationality so that law and religion could be separated into different autonomous spheres. To provide an abbreviated account of how these historical events resulted in crises for the pre-modern paradigm, Part A will briefly discuss the role of the pre-modern paradigm in the Roman Empire, and Part B will outline the crises presented by the Protestant Reformation and the Enlightenment.

A. *The Pre-modern Paradigm and The Roman Empire*

The relationship between Christianity and the Roman Empire changed dramatically over the first three hundred twenty-five years of the Christian tradition. Beginning with Jesus' arrest and crucifixion by the Romans,³² the Roman Empire persecuted Christians more or less for the first three hundred years of the Christian tradition. The "charges" brought against Christians included atheism (for rejecting the Roman gods and emperor-worship), anarchy, cannibalism (regarding misunderstandings of the Eucharist), and gross licentiousness.³³

In 312 C.E., Constantine battled with three others vying for the title of Emperor. He had a dream the night before a key battle in which "he saw the initial letters of the name of Christ with the words, 'By this sign you will conquer.'"³⁴ He painted the sign (Chi Rho) from his dream on his helmet and the shields of his soldiers. When he won this battle, he attributed the victory to the "Christian God" and soon thereafter became Emperor of the Roman Empire. In 313, the Edict of Milan gave Christians "absolute freedom of conscience, placed Christianity on a full legal equality with any religion of the Roman world, and ordered the restoration of all church property confiscated in the recent persecution."³⁵ Constantine viewed Christianity as an asset in his process of unification resulting in "one Emperor, one law, and one citizenship for all free men. . . . [and] one religion."³⁶ He further unified theological divisions within the Church by calling the First General Council of the Church in Nicaea in May 325. The Council of Nicaea produced the Creed of Nicaea recognizing the divine and human nature of Christ.³⁷

paradigm appears to still dominate contemporary understandings of the relationship between law and religion.

32. See, e.g., *Mark 14:43-15:39* (The Jerusalem Bible: Reader's Edition (1966)).

33. WILLISTON WALKER, *A HISTORY OF THE CHRISTIAN CHURCH*, 43, 45 (3d ed. 1970) (revised by Robert T. Handy).

34. *Id.* at 101.

35. *Id.*

36. *Id.* at 105.

37. *Id.* at 108-09. Note that the Nicene Creed so central to the liturgical practices of many Christian denominations is different from the Creed of Nicaea of 325. The Nicene Creed is of unknown origin and was officially approved in 451 at Chalcedon. *DOCUMENTS OF THE CHRISTIAN CHURCH* 24-26 (Henry Bettenson ed., 2d ed. 1963).

Constantine's unification of the Roman Empire with Christianity provides the archetype of the pre-modern paradigm. From Constantine's reign up through the Middle Ages, "the accepted idea was that church and state, while in principle distinct societies, were united in one commonwealth (the *corpus Christianum*): the distinction between them was to be seen chiefly in their separate hierarchies (pope and emperor, etc.) with their different functions and in the systems of law they administered."³⁸ After the fall of the Roman Empire, the Western portion (i.e., modern day Europe and the United Kingdom) broke up into smaller kingdoms and principalities but still looked to a common Christian tradition as the source of legitimacy for the rulers and their laws. The Church continued to function as a common bond among these kingdoms and principalities that outlived the Empire. Harold Berman refers to this as "a society of plural secular polities within a single ecclesiastical state."³⁹ Subsequent aristocratic rulers and Popes continued to fight over the boundaries of their authority regarding the church and state. However, although on a smaller scale, the pre-modern paradigm of a Christian commonwealth was not seriously challenged until the Protestant Reformation.

With respect to legitimating law, St. Thomas Aquinas's theory of natural law constitutes the classic medieval statement of how the law was expected to meet Christian standards under the pre-modern paradigm. Aquinas argues (based on his rational proofs for the existence of God) that the universe is governed by Divine Reason which is eternal. "Wherefore the very Idea of the government of things in God the Ruler of the universe has the nature of a law."⁴⁰ The eternal law is thus the Divine Reason that rules the universe. Aquinas further maintained that human law is not legitimate unless it meets the dictates of natural law which is "nothing else than the rational creature's participation of the eternal law."⁴¹ Through natural law (right reason), humans have an objective link to the eternal law or the Divine Reason. Natural law provides the standard for determining legal validity so "*that which is not just seems to be not law at all. . . . but a perversion of law.*"⁴²

Despite the powers of human reason, Aquinas argues that the human law is an imperfect participation in the Divine wisdom or the eternal law. Humans know the general principles of the eternal law through reason, but they do not know the Divine Wisdom in each particular case.⁴³ Further, the human participation in the eternal law (natural law) only assists in ordering the state with respect to its natural end. The Divine Law or revelation is required for humans to know the full extent of the eternal law and

38. A. R. Vidler, *Church and State*, in *THE WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS* 92 (James F. Childress & John MacQuarrie eds. 1986).

39. BERMAN, *LAW AND REVOLUTION II*, *supra* note 31, at 61.

40. St. Thomas Aquinas, *Summa Theologica*, I-II, q. 91, art. 1, in 2 *BASIC WRITINGS OF ST. THOMAS AQUINAS* 748 (Anton C. Pegis ed., 1945).

41. *Id.*, q. 91, art. 2, at 750 & q. 95, art. 2, at 784.

42. *Id.*, q. 95, art. 2, at 784.

43. *Id.*, q. 91, a. 3, at 750-52.

for humans to order the state in such a way as to assist individuals in attaining Beatitude and salvation. Aquinas argued that sacred science (revelation) is necessary for the salvation of humans “because man is directed to God as to an end that surpasses the grasp of his reason” and because the truths about God that can be determined by reason would otherwise “only be known by a few.”⁴⁴ Aquinas also claimed that sacred doctrine (the whole truth) could not be inconsistent with natural reason (partial truth). “Since therefore grace does not destroy nature, but perfects it, natural reason should minister to faith.”⁴⁵ In other words, under the pre-modern conception of law, the validity of law finally depends upon religious truths (the eternal law or Divine Reason) even if reason cannot discern all theological truths.

B. *The Protestant Reformation and Religious Wars*

Two distinctive but related historical developments challenged the pre-modern paradigm of a Christian commonwealth—the Protestant Reformation and the Enlightenment. The Protestant Reformation symbolically began with Martin Luther’s posting of his 95 Theses on the door of the Castle Church at Wittenberg on October 31, 1517.⁴⁶ Luther intended to reform the Roman Catholic Church. Instead, he started a revolution in Christianity that led to many reformers in other parts of Europe (e.g., John Calvin (France), Ulrich Zwingli (Switzerland), John Knox (Scotland), Thomas Cranmer (England)) initiating a split from the Roman Papacy and the eventual development of what we now call Protestant denominations of Christianity.⁴⁷ Harold Berman summarizes the religious and political repercussions of the Reformation as a transformation of Western Christendom “from a society of plural secular polities within a single ecclesiastical state into a society of plural Christian confessions, each identified politically with one or more particular secular states.”⁴⁸

The radical theological differences among the different Christian confessions made the subsequent conflict and wars of religion hard to avoid. For example, Luther, Calvin, and the Radical Reformers not only rejected the Roman Catholic notion of a Christian commonwealth but also rejected each other’s alternative notions of the relationship between the church and the state.⁴⁹ Luther maintains that God ordained two governments, the

44. St. Thomas Aquinas, *Summa Theologica*, I-I, q. 1, a. 1, in 1 BASIC WRITINGS OF ST. THOMAS AQUINAS 6 (Anton C. Pegis ed., 1945).

45. *Id.*, q. 1, a. 8, at 14.

46. Walker, *supra* note 33, at 185-91.

47. The focus on the Protestant Reformation is not intended to ignore the split in 1054 between the Eastern and Western parts of the Christian Tradition. Rather, my focus is on the development of Western conceptions of law and religion so the Roman Catholic tradition in Western Christianity is much more central to these developments.

48. BERMAN, LAW AND REVOLUTION II, *supra* note 31, at 61 (technically discussing only the “Lutheran reformation” but his characterization appears relevant to the broader Protestant Reformation as well).

49. See generally CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 241-403 (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella eds., 2001) [hereinafter CHRISTIAN PERSPECTIVES]

spiritual (the kingdom of God) “by which the Holy Spirit produces Christians and righteous people under Christ; and the temporal, which restrains the un-Christian and wicked so that no thanks to them—they are obliged to keep still and to maintain an outward peace.”⁵⁰ Luther criticizes the pope, bishops, and priests for becoming temporal princes rather than preaching the Word of God by punishing usury, robbery, adultery, murder, and other evil deeds with letters of excommunication.⁵¹ In other words, they confuse the temporal realm of external affairs which should be the domain of the temporal authorities with the internal realm of the soul which should be their realm. Rather, in the kingdom of the world, the unrighteous need the civil authorities and civil law to instruct and compel them to do what is good; the civil law restrains wickedness (both of non-Christians and Christians who do not lead a Christian life). Luther further claims that “the masses are and always will be un-Christian, even if they are all baptized and Christian in name. Christians are few and far between. Therefore, “it is out of the question that there should be a common Christian government over the whole world, or indeed over a single country or any considerable body of people, for the wicked always outnumber the good.”⁵²

By contrast, the Kingdom of God under Christ is ruled by the Word of God and is for the purpose of producing righteousness. The Church (i.e., the Pope, the fathers, and the councils) is not the authority which governs this kingdom. The Word of God alone governs this realm. The Word of God is the center of authority and of religious experience (*sola scriptura* - Scripture alone). “Faith comes through hearing and hearing through the Word of God.”⁵³ Further, “[a]mong Christians there shall be no authority; rather all are alike subject to one another.”⁵⁴ “[A]ll are equal and have the same right, power, possession, and honor, and where no one desires to be the other’s superior, but each the other’s subordinate” (i.e., the priesthood of all believers).⁵⁵ In the Kingdom of God, there is no need of temporal law or the sword. Christians are little Christ’s to one another because “the righteous man of his own accord does all and more than the law demands.”⁵⁶ This kingdom is ruled by the Holy Spirit without law.

(including articles discussing Roman Catholic, Calvinist, Anabaptist, Baptist, and Lutheran perspectives on the law and religion).

50. Martin Luther, *Temporal Authority: To What Extent It Should be Obeyed* (1523) (J. J. Schindel trans. & rev.’d Walther I. Brandt) in 45 LUTHER’S WORKS: THE CHRISTIAN IN SOCIETY II 91 (Walter I Brandt ed. (1962)). See also David M. Smolin, *A House Divided: Anabaptist and Lutheran Perspectives on the Sword*, in CHRISTIAN PERSPECTIVES, *supra* note 49, at 370; Marie A. Failing & Patrick R. Keifert, *Making Our Home in the Works of God: Lutherans on the Civil Use of the Law*, in CHRISTIAN PERSPECTIVES, *supra* note 49, at 386; Marie A. Failing, *The Justice Who Wouldn’t Be Lutheran: Toward Borrowing the Wisdom of Faith Traditions*, 46 CLEV. ST. L. REV. 643 (1998)(discussing Lutheran conceptions of law and the state).

51. Luther, *Temporal Authority*, *supra* note 50, at 116-17.

52. *Id.* at 91.

53. *Id.* at 117-18.

54. *Id.* at 117.

55. *Id.*

56. *Id.* at 89.

The Anabaptist position of the Radical Reformation separated these two realms even further and maintained a radical separation between the church and the world.⁵⁷ The Radical reformers argued that there ought to be such great perfection in the church that its government should suffice for law. Within the believing community, there would be not need for courts, laws, magistrates, etc.,⁵⁸ and the church and the world should remain separate.⁵⁹ For example, they argue that Christians cannot piously sue another before a court because revenge is forbidden.

Thomas Shaffer further notes that for the radical reformers, “the church is a community constituted by forgiveness.”⁶⁰ Through forgiveness, Christians attempt to transform the members of the community and maintain their relationship to the community. This is crucial because salvation is a communal process. Shaffer emphasizes that the Reformation doctrine of justification based on grace alone presents a problem of motivation.

“[I]f God forgives sin and enters into fellowship with people purely because He wills to do so, and without regard to what people do—then what reason is there for this redeemed people to behave themselves? The Anabaptist answer was that reconciliation with God (salvation, justification) is more a process than an event, and the process is communal—that is, it is a dynamic process, in a believers’ church that is forgiven and that forgives.”⁶¹

On the other hand, “‘the world’ is in rebellion” from God.⁶² The church does not attempt to transform the world into the Kingdom of God, but to maintain its separateness from it. Shaffer clarifies, however, that

57. John Leith underscores that “[t]he Radical Reformers were disappointed with the reform of Luther and of Zwingli, and with all the established Protestant Churches. They were united in the opposition to a church that was officially related to the state.” *CREEDES OF THE CHURCHES: A READER IN CHRISTIAN DOCTRINE FROM THE BIBLE TO THE PRESENT* 281 (John H. Leith ed., 3rd ed. 1983). With respect to theology, however, he maintains that “[t]he Radical or Left Wing of the Reformation contained such a variety of theologies that generalizations are impossible. One study of church-type in the ‘Left Wing of the Reformation’ distinguishes four types: 1. Anabaptists (including Swiss Brethren, South German Brethren, Hutterites, Dutch Mennonites); 2. Anti-Trinitarians; 3. Spiritualizers; 4. revolutionary prophets.” *Id.* (citing FRANK LITTELL, *THE ANABAPTIST VIEW OF THE CHURCH* (2d ed. 1958)).

58. *The Schleitheim Confession* (1527), art. 6, in *Id.* at 289 (maintaining that “it is not appropriate for a Christian to serve as a magistrate”). Leith notes that “[t]he Schleitheim Confession originated in a meeting of the Swiss Brethren on February 24, 1527. It was widely circulated among the Anabaptists and was the subject of refutation by Zwingli and Calvin. The author was Michael Sattler, who was to pay for his conviction, in May 1527, with his life.” *Id.* at 281.

59. *Id.*, art. 4, at 285-87 (advocating separation “from the evil and from the wickedness which the devil planed in the world” and withdrawal from non-believers and from “all popish and antipopish works and church services, meetings and church attendance, drinking houses, civic affairs,” etc. and denouncing “devilish weapons of force—such as sword, armor and the like, and all their use [either] for friends or against one’s enemies—by the word of Christ, Resist not [him that is] evil”).

60. Thomas L. Shaffer, *The Radical Reformation and the Jurisprudence of Forgiveness*, in *CHRISTIAN PERSPECTIVES*, *supra* note 49, at 321.

61. *Id.* at 331.

62. *Id.* at 322.

“the community of believers is prophetic, enjoying and practicing ‘a holiness that requires prophetic protest and action directed at any situation where people’s lives are being diminished or destroyed.’”⁶³ In other words, the Church seeks the welfare of the world but does not have any aspirations of making the world Christian. The Church does not wield the sword. Christians “can ‘serve the world but are not called to rule it.’”⁶⁴ Christians are called to rely solely on nonviolent means of persuading the world.

Rather than separating the church and the world, John Calvin attempts to transform the world into the Kingdom of God. He argues that the “civil government has as its appointed end, so long as we live among men, to cherish and protect the outward worship of God, to defend sound doctrine of piety and the position of the church, to adjust our life to the society of men, to form our social behavior to civil righteousness, to reconcile us with one another, and to promote general peace and tranquility.”⁶⁵ By contrast, the Radical Reformers argued that there ought to be such great perfection in the Church that its government should suffice for law within the Church. However, Calvin maintains that “since the insolence of evil men is so great, their wickedness so stubborn, that it can scarcely be restrained by extremely severe laws, what do we expect them to do if they see that their depravity can go scot-free—when not power can force them to cease doing evil.”⁶⁶ Like Luther, Calvin maintains that the state exists because of sin, and it restrains wickedness and preserves order. Contrary to Luther, Calvin contends that the state also has a pedagogical task of helping to form good Christians (i.e., the state itself has religious significance).⁶⁷ In addition, Calvin commits “*to civil government the duty of rightly establishing religion.*”⁶⁸ Furthermore, in the sixteenth century, Berman emphasizes that “the Calvinists belief in the ultimate authority in ecclesiastical matters of the elders of the local congregation of the faithful” contrasts dramatically “with the Lutheran belief in the ultimate authority in ecclesiastical matters of the territorial prince.”⁶⁹ Thus, for Calvin, the state has both a secular purpose of protecting citizens and a religious purpose of promoting the love of God but control of ecclesiastical matters belongs in the hands of local religious congregations.

63. *Id.* at 336.

64. *Id.* at 337.

65. 2 JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 1487 (John T. McNeill ed., Ford Lewis Battles trans., 1960).

66. *Id.* at [Inst. IV., xx, 2].

67. *See id.* at 1488. Calvin further argues that the state:

also prevents idolatry, sacrilege against God’s name, blasphemies against his truth, and other public offenses against religion from arising and spreading among the people; it prevents the public peace from being disturbed; it provides that each man may keep his property safe and sound; that men may carry on blameless intercourse among themselves; that honest and modesty may be preserved among men. In short, it provides that a public manifestation of religion may exist among Christians, and that humanity be maintained among men.

68. *Id.* (emphasis added).

69. BERMAN, *LAW AND REVOLUTION II*, *supra* note 31, at 58.

While this discussion only highlights a few of the disagreements among the reformers and the Roman Catholic Church, the rejection of the Roman Catholic understanding of a Christian commonwealth by Luther, Calvin, and the Radical Reformers should be clear. The importance of this disagreement for producing conflict among these groups follows from their continued adherence to the pre-modern paradigm. In this “‘confessionalization of Europe,’” Berman stresses that “[e]ach of the confessions became identified with the territories whose rulers proclaimed it.”⁷⁰ For a stable social order, rulers and subjects supposedly had to share a common religion to legitimate the state and the law and to promote social cooperation. Imagine how minority groups of Anabaptists and Calvinists (believing in congregational control of ecclesiastical matters) would respond to edicts by Roman Catholic, Lutheran, or Anglican aristocracy regarding ecclesiastical practices. Similarly, Lutherans and Anabaptists would object to Roman Catholic and Calvinist attempts to hold the state accountable to Christian standards. Calvinists would further object to governing the state primarily according to rational natural law principles rather than primarily according to scripture because human rational capabilities are usually depraved and corrupt without divine guidance.

Despite these theologically-based tensions, the kingdom’s (or principality’s) official version of the Christian religion was imposed on the people by their rulers, and those resisting the official religion were persecuted. Social stability was thought to require uniformity of religious belief. For example, “[i]n the early 1520s Denmark (and eventually Norway and Iceland, which were under Danish control) and Sweden (and Finland, which was under Swedish control) adopted a rigid state-mandated Lutheranism, with severe criminal penalties for open adherence to a non-Lutheran faith.”⁷¹ Similarly, Calvinist evangelicals in France, often referred to as Huguenots, experienced serious religious persecution. Berman notes that “[r]epression of Calvinism burst into civil war in 1562, and over the next thirty-six years a total of eight successive civil wars, known collectively as the Wars of Religion, were fought by royal Roman Catholic forces to put down the urban Huguenot uprisings.”⁷² Berman further emphasizes that “England itself, starting in the 1520s and 1530s, was torn by conflict between various forms of Protestantism, on the one hand, and a new non-Roman Anglicanism, on the other, while Anglicanism itself was torn between its original Roman Catholic theology and later Protestant theological and political influences.”⁷³ Roman Catholicism was also “outlawed in 1534 by Henry VIII and again by his son, Edward VI, restored in 1553 by Henry’s daughter, Queen Mary, and outlawed again by his younger daughter, Queen Elizabeth, in 1558.”⁷⁴

70. *Id.* at 61.

71. *Id.*

72. *Id.* at 58-59.

73. *Id.* at 59.

74. *Id.*

Berman concludes that “the confessionalization of Europe, that is, the virtual unification of church and state within each of the various European polities, . . . led to the first Great European War, the Thirty Years’ War of 1618-1648.”⁷⁵ The Thirty Years War exacted a tremendous toll on Europe. Four million people died in Germany alone reducing the population from twelve million to eight million.⁷⁶ In 1648, the Protestants and Catholics ended the Thirty Years’ War by entering into two multilateral treaties, the treaties of Münster and Osnabrück, often referred to as the “Peace of Westphalia.”⁷⁷ The Peace of Westphalia usually marks the beginning of the modern nation state, modern international law, and a new constitutional principle of limited religious liberty.⁷⁸ The recognition of equal sovereignty of each German principality, Spain, Netherlands, Switzerland, and Austria—all formerly part of the Holy Roman Empire—also signaled the decreasing significance and power of the Empire. Moreover, these changes are so significant that some scholars even mark the beginning of Modernity by the Peace of Westphalia.⁷⁹

For the purposes of the modern paradigm of law and religion, the most important aspect of the Peace of Westphalia involves the reaffirmation of “the principle of royal supremacy over both church and state” and “the new constitutional principle of limited religious toleration.”⁸⁰ While the religion of the ruler was still the official religion of each territory, the Peace of Westphalia protected the religious liberty of Catholic, Lutheran, and Calvinist subjects whose religion differed from that of their ruler.⁸¹ From this perspective, the modern paradigm can be seen as mainly a reaction to the religious pluralism and wars of religion following the Protestant Reformation. To take this as the end of the story, however, would be to ignore the important role of the Enlightenment in the 16th and 17th centuries for providing a new foundation for law.

C. *The Enlightenment and the Modern Paradigm*

In *Cosmopolis: The Hidden Agenda of Modernity*, Stephen Toulmin argues that the Enlightenment (usually seen as the beginning of Modernity) had two beginnings.⁸² The Renaissance humanists from Erasmus on,

75. *Id.* at 61.

76. *Id.*

77. See WALKER, *supra* note 33, at 389-96.

78. BERMAN, *LAW AND REVOLUTION II*, *supra* note 31, at 62.

79. STEPHEN TOULMIN, *COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY* 7, 90-93 (1990).

80. BERMAN, *LAW AND REVOLUTION II*, *supra* note 31, at 62.

81. *The Peace of Westphalia, 1648*, in DOCUMENTS OF THE CHRISTIAN CHURCH, *supra* note 37, at 216-217. My discussion of the Protestant Reformation has focused mainly on the theological differences among the reformers and the Roman Catholic Church that when combined with the pre-modern paradigm made it difficult to avoid religiously-based conflict for control of the state. However, in his article for this symposium, Robin Lovin has persuasively argued that “normative religious pluralism” in the West resulted from a “rethinking of politics originated in the Protestant Reformation, so that the necessary political arrangements for the emergence of normative religious pluralism were themselves grounded in religious thought about political life.” Robin W. Lovin, *Religion and Political Pluralism*, 27 *MISS. C. L. REV.* 89, 101(2008).

82. TOULMIN, *supra* note 76, at 81.

who are too often ignored, constituted the first beginning. He characterizes the humanists as embracing a more modest understanding of reason (thought and conduct must be reasonable rather than certain) that is more tolerant of “social, cultural, and intellectual diversity.”⁸³ The seventeenth century rationalists constituted the second beginning of the Enlightenment as a “Quest for Certainty.” Contrary to conventional accounts of rationalists as engaged in pure abstract thought, Toulmin maintains that the rationalist theories of 17th-century philosophers were “a timely response to a specific historical challenge—the political, social, and theological chaos embodied in the Thirty Years’ War.”⁸⁴ For example, René Descartes gave up on the modest skepticism of the 16th century humanists and attempted to provide “clear, distinct, and certain” foundations for knowledge that provided “a new way of establishing . . . central truths and ideas: one that was independent of, and neutral between, particular religious loyalties.”⁸⁵ Similarly, Grotius “reorganized the general rules of practical law into a system whose principles were the counterparts of Euclid’s axioms” and in the *Leviathan*, Thomas Hobbes tried to establish political theory on principles established with the same kind of geometrical certainty.⁸⁶

From the perspective of the second beginning of Modernity, the modern paradigm can be seen both as a reaction to the religious pluralism following Protestant Reformation and an attempt to find an alternative unitary foundation for law based on an Enlightenment conception of reason. In this respect, political philosopher Charles Taylor has argued that “[t]he origin point of modern Western secularism was the wars of religion; or rather, the search in battle-fatigue and horror for a way out of them. The need was felt for a ground of coexistence for Christians of different confessional persuasions.”⁸⁷ Taylor argues that this required that the public domain “be regulated by certain norms or agreements which were independent of confessional allegiance, and could in some way be ensured against overturn in the name of such allegiances.”⁸⁸ In *Justice as Fairness: A Restatement*, political philosopher John Rawls also highlights that “one historical origin of liberalism is the Wars of Religion in the sixteenth and seventeenth centuries following the Reformation” and notes that Hobbes’s *Leviathan* (1652)—surely the greatest work of political philosophy in English—is concerned with the problem of order during the turmoil of the English civil war; and so also is Locke’s *Second Treatise* (also 1689).⁸⁹

With respect to the origin of modern international law, David Kennedy maintains that the current ideas about public international law have

83. *Id.* at 199.

84. *Id.* at 70.

85. *Id.*

86. *Id.* at 76-77.

87. TAYLOR, *supra* note 5, at 32. *But cf.* John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. CHURCH AND STATE 15, 16-17 (2006) (arguing with respect to the historical debates about the separation of church and state that “separationism is an ancient Western teaching rooted in the Bible” including roots in both the Hebrew Bible and the New Testament).

88. TAYLOR, *supra* note 5, at 32.

89. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT 1* (Erin Kelly ed., 2001).

similarly evolved from a Westphalian account.⁹⁰ Although challenging this account and exaggerating its claims somewhat, he comments that

[i]nternational legal scholars are particularly insistent that their discipline began in 1648 with the Treaty of Westphalia closing the Thirty Years' War. The originality of 1648 is important to the discipline, for it situates public international law as rational philosophy, handmaiden of statehood, the cultural heir to religious principle. . . . Before 1648 were facts, politics, religion, in some tellings a "chaotic void" slowly filled by sovereign states. Thereafter, after the establishment of peace, after the "rise of states," after the collapse of "religious universalism," after the chaos of war, *came law – as philosophy, as idea, as word.*⁹¹

Kennedy pejoratively suggests that from its inception, the idea of international law has been associated with a movement beyond "the inadequacies of religion" (*i.e.*, religion produces war not peace) to a rational notion of law to govern the relations among the evolving nation-states.⁹² In this account, religion is "something we used to have" which "begins as a social force, is transformed into a 'philosophy' [natural law theory] and survives only as a set of 'principles,' guiding the practice of institutions."⁹³ By the end of the traditional period (1648-1918), these principles are no longer legitimated by natural law but by a positivist account of sovereign consent.⁹⁴ Subsequently, in the modern era, the focus has shifted to the pragmatic application of doctrinal principles and the international institutions that make this possible. Moreover, Kennedy charges that this problematic account of international law maintains that international law, in a sense, takes the place of religion with an "essentially ecumenical and anti-imperial" universality.⁹⁵

90. David Kennedy, *A New Stream of International Law Scholarship*, 7 *WIS. INT'L L.J.* 1, 12-28 (1988).

91. *Id.* at 14 (emphasis added). Kennedy maintains that the "goal in this historical work has been to unsettle the confidence of twentieth century international law in its ability to transcend and supplant the difficulties and contradictions of philosophy through pragmatic and functional structures." *Id.* at 28.

92. *Id.* at 19.

93. *Id.* at 18, 19.

94. *Id.* at 22.

95. *Id.* at 23. This account is not to suggest that others do not argue for an essential relationship between international law and religion. See, e.g., John D. Carlson & Erik C. Owens, *Reconsidering Westphalia's Legacy for Religion and International Politics*, in *THE SACRED AND THE SOVEREIGN: RELIGION AND INTERNATIONAL POLITICS 1* (John D. Carlson & Erik C. Owens eds., 2003) (introduction for chapters reevaluating the relationship between religion and national sovereignty, international law, and human rights); RICHARD FALK, *RELIGION AND HUMANE GLOBAL GOVERNANCE 11* (2001) (begins exploring "a form of *reconstructive postmodernism* [theory of international relations], that is, a post-Westphalian perspective that is informed by ethical values and spiritual belief") (emphasis in original); *RELIGION AND INTERNATIONAL LAW* (Mark W. Janis & Carolyn Evans eds. 1999); MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 29* (1998) (arguing that "if—the conviction that every human being is sacred is inescapably religious, it follows that the idea of human rights is ineliminably religious, because the conviction is an essential, even foundational, constituent of the idea"); *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* (Mark W. Janis ed. 1991);

If we extrapolate from Kennedy's comments to the modern paradigm's account of law in general, a series of unanswered questions arises. Can law take the place of religion? Should law provide a secular comprehensive conviction about authentic human existence? Is secularism a kind of religion? Can law do without religion? What needs to be assumed about law for it to be kept separate from religion? Must law have one source of legitimation? To address these questions, Section III will set forth a definition of religion, religious pluralism, and the secularization of law.

III. RELIGION, RELIGIOUS PLURALISM, AND THE SECULARIZATION OF LAW

More specifically, Section III will explore how the contemporary conceptions of religion have roots in the seventeenth century as an attempt to deal with the wars of religion and how conceptions of religion have further expanded to deal with the growth of religious pluralism in the West beyond pluralism within the Christian tradition. Furthermore, it will summarize the concept of the secularization of society and its relevance for legitimating law under the modern paradigm.

A. Defining Religion

The discussion of the Protestant Reformation helped demonstrate the comprehensive nature of religious convictions.⁹⁶ Even within Christianity, theological differences resulted in dramatic differences of how to understand the requirements of the Christian life and whether the state could be held to Christian standards. These theological differences helped fuel the wars of religion that ravaged Europe and England in the seventeenth century. Partly in response to these religious wars, Wilfred Cantwell Smith notes that scholars in the seventeenth and eighteenth centuries began developing the concept of religion as something with generic characteristics which many religions exhibit.⁹⁷ He also claims that the use of the term religion underwent a shift at about this time:

some Renaissance humanists and then some Protestant Reformers adopted a concept religion to represent an inner piety; but that in the seventeenth and early eighteenth centuries this was largely superseded by a concept of schematic

Richard Ashcraft, *Religion and Lockean Natural Rights*, in *Religious Diversity and Human Rights* 195, 196 (Irene Bloom, et al. eds. 1996)(arguing that John Locke rejected the common Western assumption (which is often attributed to him) that "in any general discussion of individual rights" that "religion is one of the least important explanatory factors to be considered.").

96. Parts A and B relating to defining religion and religious pluralism summary are taken in part from a longer account of the nature of religion in the context of judicial decision making. See Modak-Truran, *Reenchanting the Law*, *supra* note 9, at 721-28, 799-806.

97. WILFRED CANTWELL SMITH, *THE MEANING AND END OF RELIGION: A NEW APPROACH TO THE RELIGIOUS TRADITIONS OF MANKIND* 43 (1962) (emphasizing that this generic concept of religion "is a concept primarily formulated and used by men who are weary of the clash or suspicious of the whole enterprise.").

externalization that reflected, and served, the clash of conflicting religious parties, the emergence of a triumphant intellectualism, and the emerging new information from beyond the seas about the patterns of other men's religious life. These provided the foundations of the concept for the modern world.⁹⁸

This shift had several important consequences. First, it helped move beyond the pejorative use of the term religion as a label to distinguish "religions" (i.e., a false faith) from your personal piety or true faith.⁹⁹ Prior to this change, the term "faith" was used as a positive reference to one's own personal piety while others with different beliefs merely had "religion". In addition, it allowed reference to "a generic 'religion' . . . as an external entity the total system or sum of all systems of beliefs, or simply the generalization that they are there."¹⁰⁰ This facilitated referring to all faiths by the plural "religions" so that no particular religion had a *prima facie* preference to other religions. As noted in Part B, this generic classification is crucial to the notion of religious pluralism presupposed by the modern paradigm.

Finally, this shift in usage meant that "religion is something that one believes or does not believe, something whose propositions are true or are not true, something whose *locus* is in the realm of the intelligible, is up for inspection by the speculative mind."¹⁰¹ As discussed in this Part below, treating religion as a set of beliefs meant that religion had both a subjective side (i.e., whether one believes) and an objective side (i.e., what one believes). In Part C, the modern paradigm and its understanding of secularization of the law will be shown to further assume that science is objectively true while religion is only subjectively true. This epistemological claim and the recognition of the subjective and objective sides of religion facilitate regulating religion to the private or subjective realm in the modern paradigm.

While not sufficiently taken into account in the modern paradigm, the academic understanding of religion has advanced considerably since these first attempts to define religion. Rather than assuming that everyone knows what counts as "religion," the academic study of religion proceeds by various methods of analyzing religion. Religion scholar John Hick maintains that "[r]eligion is one thing to the anthropologist, another to the sociologist, another to the psychologist," another to the theologian, and another to the philosopher.¹⁰² This results, in part, from the different purposes of the many types of inquiries that analyze the nature of religion

98. *Id.* at 44.

99. *Id.* at 42-43.

100. *Id.* at 43.

101. *Id.* at 40.

102. JOHN HICK, *PHILOSOPHY OF RELIGION* 3 (2d ed. 1973).

including the anthropology of religion,¹⁰³ sociology of religion,¹⁰⁴ psychology of religion,¹⁰⁵ history of religions,¹⁰⁶ theology,¹⁰⁷ and philosophy of religion. For example, sociology of religion views religion “in terms of social interaction” and studies religion “with reference to the general concepts of

103. See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 87-141 (1973). Geertz defines a religion as “(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.” *Id.* at 90. While Geertz’s definition has continued to be quite influential, scholars continue to debate its merits. See, e.g., Kevin Schilbrack, *Religion, Models of, and Reality: Are We Through with Geertz?*, 73 J. AM. ACAD. RELIGION 429 (2005) (responding to two criticisms of Geertz’s project and despite partial merit of criticisms, arguing that Geertz’s approach is legitimate and fruitful).

104. See, e.g., EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (Joseph Ward Swain trans., 1915). Durkheim comments that “religion is something eminently social. Religious representations are collective representations which express collective realities.” *Id.* at 22. More specifically, he proposes a famous definition of religion as:

[A] unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those who adhere to them. The second element, which thus finds a place in our definition, is no less essential than the first; for by showing that the idea of religion is inseparable from that of the Church, it makes it clear that religion should be an eminently collective thing.

Id. at 62-63; see also PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* (1967).

105. See, e.g., WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* (1982) (Martin E. Marty ed.). James states that religion “shall mean for us *the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.*” *Id.* at 31; see also Don Browning, *Can Psychology Escape Religion? Should It?*, 7 INT’L J. PSYCHOL. RELIGION 1, 3 (1997). Browning defines religion as “a narrative or metaphorical representation of the ultimate context of reality and its associated worldview, rituals, and ethics . . . Furthermore, the concept of religion assumes that the narratives, worldviews, rituals, and ethics are held and celebrated by some identifiable community.” *Id.*

106. See, e.g., MIRCEA ELIADE, *THE SACRED & THE PROFANE: THE NATURE OF RELIGION* (Willard R. Task trans., Harcourt Brace Jovanovich & World, Inc. 1959). Eliade argues “that *sacred and profane* are two modes of being in the world, two existential situations assumed by man in the course of his history” and notes that his chief concern is “to show in what ways religious man attempts to remain as long as possible in a sacred universe, and hence what his total experience of life proves to be in comparison with the experience of the man without religious feeling, of the man who lives, or wishes to live, in a desacralized world.” *Id.* at 13, 14. He further emphasizes that “the *completely profane world*, the wholly desacralized cosmos, is a recent discovery in the history of the human spirit.” *Id.* at 13.

107. See, e.g., PAUL TILlich, *1 SYSTEMATIC THEOLOGY* (1951). Paul Tillich defines religion in terms of the concept of ultimate concern. *Id.* at 11-12. He states:

The religious concern is ultimate; it excludes all other concerns from ultimate significance; it makes them preliminary. The ultimate concern is unconditional, independent of any conditions of character, desire, or circumstance. The unconditional concern is total: no part of ourselves or of our world is excluded from it; there is no ‘place’ to flee from it. The total concern is infinite: no moment of relaxation and rest is possible in the face of a religious concern which is ultimate, unconditional, total, and infinite.

Id. See also DAVID TRACY, *PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE* 84 (1987). For Tracy, “religions are exercises in resistance. Whether seen as Utopian visions or believed in as revelations of Ultimate Reality, the religions reveal various possibilities for human freedom that are not intended for that curious distancing act that has become second nature to our aesthetic sensibilities.” *Id.* He further claims that religious questions are “limit questions” which “must be logically odd questions, since they are questions about the most fundamental presuppositions, the most basic beliefs, of all our knowing, willing, and acting.” *Id.* at 86, 87.

sociology, including leadership, stratification, and socialization.”¹⁰⁸ Despite these advances, no generally accepted definition of religion exists and probably never will exist.¹⁰⁹

For the purposes of this article, however, the central concern is to understand the role of religious convictions or claims in legitimating the law. The primary concern is with the kind of claims religion makes and how religious claims are related to other types of claims such as legal and moral claims. In contrast to the other approaches to understanding religion, the philosophy of religion has typically focused on these questions. Therefore, I will adopt the philosophy of religion approach taken by Schubert Ogden and define religion in such a way as to outline the relationship between religious claims and legal and moral claims.

Regarding the definition of religion, Ogden defines religion as “the primary form of culture in terms of which we human beings *explicitly* ask and answer the existential question of the meaning of ultimate reality for us.”¹¹⁰ According to this account, religion *explicitly* asks what is “authentic human existence” or “how we are to understand ourselves and others in relation to the whole”.¹¹¹ The existential question, the question of meaning, is the question which is presupposed by all other questions. It is the comprehensive question concerning “what is the valid comprehensive self-understanding” or “comprehensive human purpose”.¹¹² Religion *explicitly* answers the existential or comprehensive question by providing the “concepts and symbols whose express function is to mediate authentic self-understanding.”¹¹³ In other words, religion includes a comprehensive

108. GEORGE A. THEODORSON & ACHILLES G. THEODORSON, A MODERN DICTIONARY OF SOCIOLOGY 406 (1969).

109. Cf. Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 454 (1998) (pointing out the difficulties of defining religion and identifying that “the goal of religious studies in the academic, legal, and political context, as well as in a scholarly setting, is to develop a common discourse about religion and religious difference.”).

110. SCHUBERT M. OGDEN, IS THERE ONLY ONE TRUE RELIGION OR ARE THERE MANY? 5 (1992) (emphasis added) [hereinafter OGDEN, IS THERE ONLY ONE].

111. *Id.* at 6. In more technical terms, the existential or religious question involves a metaphysical aspect and an ethical aspect that are closely related. In its metaphysical aspect, “it asks about the ultimate reality of our own existence in relation to others and the whole.” *Id.* at 17. Unlike metaphysics proper, which determines the structure of ultimate reality itself, the metaphysical aspect of religion tells us the meaning of ultimate reality for us. In addition, in its ethical aspect, religion “asks about our authentic self-understanding.” *Id.* at 18. Here again, there is a difference between ethics proper, which asks how we are to act, and the ethical aspect of religion, which tells us how we are to understand ourselves. Moreover, each specific religion answers both the metaphysical and ethical aspects of the existential question.

112. FRANKLIN I. GAMWELL, THE MEANING OF RELIGIOUS FREEDOM: MODERN POLITICS AND DEMOCRATIC RESOLUTION 22-23 (1995). Gamwell further recognizes that his “definition and discussion of religion is nothing other than an attempt to appropriate [Ogden’s] formulations for the purposes of the present inquiry.” *Id.* at 15 n.1. Cf. Steven D. Smith, *Legal Discourse and The De Facto Disestablishment*, 81 MARQ. L. REV. 203, 216 (1998) (claiming that “what we call ‘religion’ typically amounts to a comprehensive way of perceiving and understanding life and the world; it affects *everything*”) (emphasis added).

113. OGDEN, IS THERE ONLY ONE, *supra* note 110, at 8.

evaluation of human activity in terms of the nature of existence to determine “how human activity as such ought to make a difference to the larger reality of which it is a part.”¹¹⁴

If the existential or comprehensive question is presupposed by all other questions, does that mean that answering any question (such as which party should win a law suit) presupposes an answer to the existential question? Yes and no. Ogden argues that “everything that we think, say, or do, insofar, at least, as it makes or implies a claim to validity, necessarily presupposes that ultimate reality is such as to authorize some understanding of ourselves as authentic and that, conversely, some understanding of our existence is authentic because it is authorized by ultimate reality.”¹¹⁵ Consequently, in a sense, answering any question implies an understanding of what constitutes authentic human existence or an answer to the comprehensive or existential question. However, Franklin Gamwell notes that this does not mean that all human activity is religious but that “the character of human activity as such implies the possibility of religion, in the sense that it implies the comprehensive question and, therefore, the possibility that this question is asked and answered explicitly.”¹¹⁶ Human activity is thus religious only to the extent that the existential or comprehensive question has been *explicitly* asked and answered.

To differentiate between explicitly answering and implicitly “answering” the comprehensive question, Ogden refers to the former as religion and the latter as a “basic faith in the meaning of life.”¹¹⁷ Ogden argues that this basic faith is presupposed by all human activity. It involves “accepting the larger setting of one’s life and adjusting oneself to it.”¹¹⁸ It implicitly answers the existential or comprehensive question because it involves a self-conscious adjustment to these conditions.¹¹⁹ Unlike other animals, human animals not only “live by faith” but “seek understanding.”¹²⁰ Humans are “instinct poor”; “[n]ot only the details of our lives but even their overall pattern as authentically human remain undecided by our membership in the human species and are left to our own freedom and responsibility to decide.”¹²¹ In other words, humans do not live by merely accepting their setting and adjusting to it (basic faith); they seek a reflective self-understanding of reality (the whole) and their place in it (authentic human existence). Religion provides the concepts and symbols for human

114. GAMWELL, *supra* note 112, at 25.

115. OGDEN, *IS THERE ONLY ONE*, *supra* note 110, at 7.

116. GAMWELL, *supra* note 112, at 23 n.5.

117. OGDEN, *IS THERE ONLY ONE*, *supra* note 110, at 18.

118. SHUBERT M. OGDEN, *ON THEOLOGY* 70 (1986).

119. For clarity, it should be noted that Ogden argues that both basic faith and religion involve understanding and faith. However, basic faith is not reflective while religion is reflective. In terms slightly different to those used here, he distinguishes between “the *existential* understanding or faith [basic faith] that is constitutive of human existence as such and the *reflective* understanding or faith [religion] whereby what is presented existentially can be re-presented in an express, thematic, and conceptually precise way.” *Id.* at 71.

120. *Id.* at 106.

121. OGDEN, *IS THERE ONLY ONE*, *supra* note 110, at 6.

reflective self-understanding; it attempts to make sense “of our basic faith in the meaning of life, given the facts of life as we actually experience it.”¹²² To the extent that humans act with reflective self-understanding or have an explicit comprehensive understanding of authentic human existence, they are religious. Consequently, for the purposes of this discussion, “religion” will be equated with an explicit “comprehensive claim or conviction about human authenticity.”

Accordingly, religion not only includes the recognized world religions of Christianity, Judaism, Islam, Hinduism, and Buddhism, but it also includes humanism, capitalism (when proposed as a normative rather than as a positive theory),¹²³ communism, and other so-called secular answers to the existential question. This means that there is and always has been a plurality of religions or comprehensive self-understandings. As a result, all human activity (including legal interpretation) is either explicitly informed by a plurality of religious convictions or implicitly informed by a basic faith in the meaningfulness of existence.

Schubert Ogden also maintains that reason plays an essential role in the articulation and evaluation of religious convictions.¹²⁴ He rejects two

122. *Id.* at 18.

123. See David R. Loy, *The Religion of the Market*, 65 J. AM. ACAD. RELIGION 275 (1997). After adopting a functionalist view of religion “as what grounds us by teaching us what the world *is*, and what our *role* in the world is,” Loy argues that “our present economic system should also be understood as our religion, because it has come to fulfill a religious function for us. The discipline of economics is less a science than the theology of that religion, and its god, the Market, has become a vicious circle of ever-increasing production and consumption by pretending to offer a secular salvation. The collapse of communism—best understood as a capitalist ‘heresy’—makes it more apparent that the Market is becoming the first truly world religion, binding all corners of the globe more and more tightly into a worldview and set of values whose religious role we overlook only because we insist on seeing them as ‘secular.’” *Id.*

124. Despite the common assumption that religion is nonrational, many theologians and philosophers have argued that religious convictions depend, at least in part, on rational reflection for their articulation and evaluation. This does not mean that they have agreed upon the definition of reason, its role in critical reflection, or its priority with respect to revelation. Differences about these issues should not take away from the important role reason has played in formulating and critiquing religious convictions. For example, reason has been central to systematic theology and philosophical theology even though there has not been agreement on how the role of reason should be defined. At one extreme, Immanuel Kant argues that philosophical theology depends on pure reason to understand the possibility and the attributes of the concept of God. IMMANUEL KANT, LECTURES ON PHILOSOPHICAL THEOLOGY (Allen W. Wood & Gertrude M. Clark trans., 1978). At the other extreme, Paul Tillich claims that reason alone cannot give answers to the ultimate questions about life because in the existential situation, reason contradicts itself. PAUL TILLICH, 1 SYSTEMATIC THEOLOGY 18-28 (1951). Philosophy helps analyze the existential situation in which we live, but “[r]evelation is the answer to the questions implied in the existential conflicts of reason.” *Id.* at 147. Somewhere in between, David Tracy maintains that “contemporary Christian theology is best understood as philosophical reflection upon the meanings present in common human experience and the meanings present in the Christian tradition.” DAVID TRACY, BLESSED RAGE FOR ORDER: THE NEW PLURALISM IN THEOLOGY 34 (1975). Although these approaches incorporate philosophy (reason) into theology in different ways, they all support the necessary role of reason for theological reflection about religious convictions. Religious convictions are not exempt from critical reflection; they are the product of critical reflection. This is not to say that other theologians have not deemphasized or minimized the role of reason in theological reflection. See, e.g., 1 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 35-37 (John T. McNeill ed., Ford Lewis Battles trans., 1960) (arguing that religious arguments based on revelation are more reliable because human reason is corrupted by sin (self-deception)). Rather, it is to emphasize that there are numerous theologians and philosophers who have embraced reason as a central part of the theological task of

common assumptions about theology that preclude critical reflection on religious convictions: “(1) that theology as such has to appeal to special criteria of truth for some if not all of its assertions; and (2) that the theologian as such has to be a believer already committed to the truth of the assertions that theological reflection seeks to establish.”¹²⁵ To the contrary, he argues that religious convictions are subject to critical validation. Religious convictions are different in the sense that they are comprehensive but that does not mean they are beyond critical or rational validation. In fact, he maintains that “it is the very nature of a religion to make or imply the claim to formal religious truth.”¹²⁶ In other words, religious convictions, like any cognitive claim, suggest that they can be validated in a non-question-begging way.¹²⁷

B. Religious Pluralism

Given that religious convictions can be critically validated, Ogden could be read to suggest that there is only one true religion that can be arrived at by critical reflection. If this were the case, the state could establish this religion as the official legitimation of the law and the state. To the contrary, Ogden maintains that the debate about religious pluralism has been mistaken because it has proceeded from the assumption that there is either one true religion (*monism*) or that there are many equally true religions (*pluralism*). He argues that religious monism comes in two varieties: exclusivism and inclusivism. For example, in its Christian form, exclusivists claim that there is “no salvation outside of the Church” or “no salvation outside of Christianity.”¹²⁸ By contrast, Christian inclusivists argue that

[T]he possibility of salvation uniquely constituted by the event of Jesus Christ is somehow made available to each and every human being without exception [usually through the fragmentary explication of the true religion (Christianity) by other religions] and, therefore, is exclusive of no one unless she or he excludes her- or himself from its effect by a free and responsible decision to reject it.¹²⁹

The alternative usually proposed to these two forms of monism is pluralism. Pluralists maintain “not only that there *can be* many true religions but there actually *are*.”¹³⁰ On this account, all religions are equally true,

articulating and evaluating religious convictions. These positions thus further support the assumption that religious convictions are rational and subject to critical reflection.

125. OGDEN, ON THEOLOGY, *supra* note 118, at 103.

126. OGDEN, IS THERE ONLY ONE, *supra* note 110, at 13.

127. For further elaboration on Ogden's arguments, see Modak-Truran, *Reenchanting the Law*, *supra* note 9, at 799-805.

128. OGDEN, IS THERE ONLY ONE, *supra* note 110, at 28-29.

129. *Id.* at 31.

130. *Id.* at 27.

and one religion cannot be shown to be true and another false. The modern paradigm appears to assume pluralism in this sense. Treating religious convictions as equally true (or equally false) means that they can be relegated to the private or subjective realm which is consistent with the conventional understanding of secularizing the law. As noted by Max Weber in Part C, the modern paradigm and its understanding of secularization of the law seem to further assume that science is objectively true so that science rather than religion should be used to find an objective foundation for the law. The problematic nature of this hidden assumption will become more pronounced in the discussion in Section IV of the ontological gap between the practice of law, which presupposes a religious ontology, and legal theory under the modern paradigm, which presupposes a scientific ontology (i.e., scientific materialism).

Conversely, Ogden contends that religious convictions are capable of critical validation. Some religious convictions are capable of critical validation by theology and philosophy and others are not. This seems to suggest religious monism, but Ogden argues for another option, which he calls "pluralistic inclusivism."¹³¹ He maintains that the logical contradictory to religious monism "is not that there actually *are* many true religions, but only that there *can be*."¹³² In other words, more than one religion may be capable of critical validation. More than one religion may be the true reflective understanding of our basic existential faith.

Also, as a product of critical reflection, religious convictions can be modified and corrected based on further reflection and based on what is learned from dialogue with other religions. The pursuit of religious truth is never complete. Through ongoing reflection and encounters with other religions, the possibility for improvement is ever present. Consequently, even if a religion could be shown to be more true than others, Ogden would oppose the establishment of an official religion. Establishing an official religion would cut off the opportunity for further improvement and refinement of religious truth. It would stifle the pursuit of religious truth and jeopardize further progress from subsequent rational reflection and dialogue among those holding a plurality of religious convictions.

Ogden's account of religion and religious pluralism illuminates the discussion of paradigms of law and religion in several ways. First, Ogden's definition clarifies why the pre-modern paradigm resulted in so much conflict after the Protestant Reformation. The pre-modern paradigm only allows for one of the post-Reformation Christian confessions to legitimate the law and the state. However, from the stand point of religious minorities, the official or established religion does not legitimate the law or the state. Each person's religion constitutes the comprehensive condition of validity for all normative claims including claims about the legitimacy of the law and the state. As noted in Section II, the substantial theological

131. See *id.* at x-xi.

132. *Id.* at 83.

differences among Roman Catholics, Lutherans, Calvinists, and Anabaptists also meant that those in the religious minority were often subject to coercive efforts by rulers to impose their religious affiliation on them. Under the pre-modern paradigm, conflict between the state and minority religious groups appears inevitable because they reject the official religious legitimation of the ruler and its law but are coerced to accept it.

In addition, Ogden's account challenges the conventional distinction between what is considered secular and what is considered religious. Breaking down this distinction potentially calls into question the claimed neutrality of the modern paradigm among religions based on its alleged secular foundation for law. If the secular foundation constitutes a comprehensive conviction about authentic human existence, then the foundation is religious rather than "secular". Rather than remaining neutral to other religions, the "secular" foundation competes and conflicts with a plurality of religions. For example, Section VI will argue that the French doctrine of *laïcité* necessitates secular solidarity (i.e., secularism), which constitutes a comprehensive conviction about authentic human existence. This explains the current heated conflict in France between the state-sponsored secularism that precludes Muslim girls from wearing headscarves in school and interpretations of Islam that require Muslim girls to wear headscarves in school. Furthermore, Section V will argue that John Rawls's and Jürgen Habermas's liberal versions of the modern paradigm depend upon a hidden comprehensive doctrine that is not religiously neutral and that leads to self-contradiction. Consequently, I will conclude that the modern paradigm is closer to the pre-modern paradigm than most scholars have recognized because it continues a unitary religious legitimation of law by other means.

C. *The Secularization of the Law*

While currently being reevaluated, the theory of secularization has been part of sociology since the post-Enlightenment origins of the discipline. The work in sociology of religion by Max Weber and Émile Durkheim, two of the founders of modern sociology, provided the "foundations for the more systematic formulations of the theory of secularization."¹³³ Sociologist José Casanova identifies "the core and central thesis of the theory of secularization" as "the conceptualization of the process of societal modernization as a process of functional differentiation and emancipation of the secular spheres—primarily the state, the economy, and science—from the religious sphere and the concomitant differentiation and specialization of religion within its own newly found religious sphere."¹³⁴ In addition to the general conception, secularization may also refer to the actual historical processes of secularization in a particular society or the anticipated consequences of those processes on religion.

133. CASANOVA, PUBLIC RELIGIONS, *supra* note 3, at 17.

134. *Id.* at 19.

Casanova further notes that it reached “a truly paradigmatic status within the modern social sciences” without really being supported empirically.¹³⁵ In fact, he argues that “the theory of secularization is so intrinsically interwoven with all the theories of the modern world and with the self-understanding of modernity that one cannot simply discard the theory of secularization without putting into question the entire web, including much of the self-understanding of the social sciences.”¹³⁶ In the 1960s, the theory began to receive “more systematic and empirically grounded formulations of the theory of secularization,” but by the 1980s, criticism began mounting because of the increasing public role of religion.¹³⁷ While Casanova still thinks the core of the theory is defensible with some revisions, a large group of American sociologists like Peter Berger have concluded “a whole body of literature by historians and social scientists loosely labeled ‘secularization theory’ is essentially mistaken.”¹³⁸

One of the difficulties in sorting out this debate has to do with the different uses of the term secularization. Casanova has argued that the theory of secularization is better understood as having three different connotations. First, its most widespread current usage is to refer to the “*decline of religious beliefs and practices* in modern societies.”¹³⁹ Second, secularization is often understood as the “*privatization of religion* . . . both as a general modern historical trend and as a normative condition, indeed as a precondition for modern liberal democratic politics.”¹⁴⁰ Finally, “the core component of classic theories of secularization” is the claim that secularization entails the “*differentiation of the secular spheres* (state, economy, science) usually understood as an ‘emancipation’ from religious institutions and norms.”¹⁴¹

With respect to the modern paradigm, the first two types of secularization, which have been widely criticized, are not as relevant as the third type of secularization as a differentiation of law from religion and morality.¹⁴² This process of differentiation raises several important issues for the modern paradigm. Does the institutional separation of the law from religious institutions mean that religious norms and the law are autonomous or separate spheres? What provides the legitimation of law without religion and morality? Is law reduced to power or privilege? Does the secularization of

135. *Id.* at 17.

136. *Id.* at 18.

137. *Id.* at 19.

138. Peter L. Berger, *The Desecularization of the World: A Global Overview*, in *The Desecularization of the World: Resurgent Religion and World Politics 2* (Peter L. Berger ed. 1999).

139. Casanova, *Rethinking Secularization*, *supra* note 3, at 7.

140. *Id.*

141. *Id.*

142. The third type of secularization (differentiation of secular spheres) may overlap to some extent with the second type in the sense that the “privatization of religion” is sometimes assumed to be a “normative condition modern liberal democratic politics.” Given that Weber and Habermas focus on the third type without noting this potential overlap, I will not distinguish these two types but take them as related theses supporting both descriptive and normative claims about the secularization of law.

law mean that the legitimation of law is independent of religion? Can law have both a secular and religious legitimation?

Max Weber's account of secularization or rationalization of society and its consequences for the legitimation of law addresses many of these questions from the perspective of the modern paradigm. Weber's theory of rationalization includes a very elaborate typology of the different ideal types of rationality (e.g., subjective, objective, objectified, conceptual, instrumental, substantive, and formal) that he finds in Western culture.¹⁴³ For the purposes of this Article, it will serve to offer a general understanding of Weber's theory and how it raises questions about the legitimation and application of law.¹⁴⁴

According to Weber, Western culture is characterized by a "specific and peculiar rationalism"¹⁴⁵ that has resulted in the "disenchantment of the world."¹⁴⁶ Before disenchantment, religious and metaphysical worldviews gave comprehensive explanations of the whole of life; life was not yet differentiated into spheres.¹⁴⁷ Science, the only form of objective knowledge, then showed that religious and metaphysical worldviews could not provide an "objectively" rational explanation of the world.¹⁴⁸ "Every increase of rationalism in empirical science," Weber maintains, "increasingly pushe[d] religion from the rational into the irrational realm."¹⁴⁹ For Weber, science and scientific (instrumental or means/end) rationality are normative because they comprise "the only possible form of a reasoned view of the world."¹⁵⁰ "For scientific truth is precisely what is *valid* for all who *seek* the truth."¹⁵¹ Moreover, science discloses to us that the world process is a "meaningless infinity . . . on which *human beings* confer meaning and significance."¹⁵²

Accordingly, Weber claims that modern individuals (who are presumed to embrace scientific rationality) are faced with the knowledge of an absolute division between objectively rational facts and subjectively rational values.¹⁵³ All values are subjective and are only subjectively valid.¹⁵⁴

143. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 292-301 (H. H. Gerth and C. W. Mills trans. & eds., 1958) [hereinafter WEBER, FROM MAX WEBER].

144. For a more detailed treatment of Weber's social theory and legal positivism (from which the discussions in Sections I and III are partially drawn), see Mark C. Modak-Truran, *Secularization, Legal Indeterminacy, and Habermas's Discourse Theory of Law*, 35 FLA. ST. U. L. REV. 73, 79-84 (2007), and Mark Modak-Truran, *Habermas's Discourse Theory of Law and the Relationship Between Law and Religion*, 26 CAP. U. L. REV. 461, 464-72 (1997).

145. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 26 (Talcott Parsons trans., 1958) [hereinafter WEBER, THE PROTESTANT ETHIC].

146. WEBER, FROM MAX WEBER, *supra* note 143 at 155, 350.

147. *Id.* at 154-55.

148. *Id.* at 350-51.

149. *Id.* at 351.

150. *Id.* at 355.

151. MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 84 (Edward A. Shils & Henry A. Finch trans. & eds., 1949) [hereinafter WEBER, METHODOLOGY].

152. *Id.* at 81.

153. *Id.* at 18-19, 52-53.

154. *Id.* at 51-53, 83.

Although objective scientific rationality can determine the *technically correct* means to a given end, it cannot determine the *correct* value-orientation.¹⁵⁵ Weber maintains that “the choice between ‘God’ and the ‘Devil’” and “every single important activity and ultimately life as a whole . . . is a series of ultimate decisions through which the soul—as in Plato—chooses its own fate, i.e., the meaning of its activity and existence.”¹⁵⁶ Value-orientations (traditional, affectional, value-rational, and instrumental) are based on an irrational, arbitrary, and criterionless choice.¹⁵⁷ “There is no (rational or empirical) scientific procedure of any kind whatsoever which can provide us with a decision here.”¹⁵⁸ Science can make objectively rational judgments for only a narrow range of technical problems where the end is precisely given and the only decision concerns choosing the most rational means.¹⁵⁹ Consequently, scientific rationality, the most distinctive type of rationality defining Western culture, cannot solve the most important individual and social problems concerning what ends or values to pursue.¹⁶⁰

The “specific and peculiar rationalism of Western culture” has further resulted in the differentiation of society into numerous spheres of life or objectified forms of rationality including industrial capitalism, formalistic law, and bureaucratic administration.¹⁶¹ These objectified forms of rationality have become embodied or institutionalized in the social order and confront individuals as something external. For example, the objectified rationality of industrial capitalism has “become an iron cage” or “an immense cosmos into which the individual is born, and which presents itself . . . as an unalterable order of things in which he must live.”¹⁶² One of the leading principles of capitalism, the Protestant Ethic, requires “the earning of more and more money, combined with the strict avoidance of all spontaneous enjoyment of life.”¹⁶³ In the world of “economic survival of the fittest,” violating this principle results in being “eliminated from the economic scene.”¹⁶⁴ Likewise, modern bureaucratic organization constitutes an “‘escape-proof’” “inanimate machine” that “is busy fabricating

155. *Id.* at 18-19, 34-35.

156. *Id.* at 18.

157. *Id.* at 18-19; WEBER, FROM MAX WEBER, *supra* note 143, at 152.

158. WEBER, *METHODOLOGY*, *supra* note 151, at 19.

159. *Id.* at 18-19, 52-53.

160. For Habermas's and other Frankfurt School thinkers' critiques of instrumental reason, see 1 JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 366-99* (Thomas McCarthy trans., 1984) [hereinafter 1 HABERMAS, *THEORY OF COMMUNICATIVE ACTION*].

161. WEBER, *THE PROTESTANT ETHIC*, *supra* note 145, at 26. Weber's use of the term “objective rationality” is ambiguous. It can be interpreted as meaning both objectively correct action and as supra-individual or institutionalized rationality. Thus, I have used the term “objectified” to denote “objectivity” in the institutionalized sense. In addition, please note that Habermas refers to Weber's “spheres of life” both as spheres, 1 HABERMAS, *THEORY OF COMMUNICATIVE ACTION*, *supra* note 160, at 244-71, and as “cultural subsystems.” *Id.* at 72. I will use the term “spheres of life” or “spheres” to promote continuity with the discussion of Weber.

162. WEBER, *THE PROTESTANT ETHIC*, *supra* note 145, at 181, 54.

163. *Id.* at 53.

164. *Id.* at 55.

the shell of bondage which men will perhaps be forced to inhabit some day."¹⁶⁵

Moreover, in *The Protestant Ethic and the Spirit of Capitalism*, Weber observes that "[t]here is, for example, rationalization of mystical contemplation, that is of an attitude which, viewed from other departments of life, is specifically irrational, just as much as there are rationalizations of economic life, of technique, of scientific research, of military training, of law and administration."¹⁶⁶ He clarifies that "each one of these fields may be rationalized in terms of very different ultimate values and ends, and what is rational from one point of view may well be irrational from another."¹⁶⁷ The rationalization of society has thus affected all areas of culture resulting in a variety of differentiated fields (i.e., "spheres of life"). He further concludes that the rationalization of society includes a multiplicity of historical processes of rationalization (both internal and external to the spheres) that are proceeding at different rates and that are furthering different ends and values.

The rationalization of Western culture has also affected the bases of legitimation within these differentiated "spheres of life," including law. Weber recognizes four basic types of legitimation: (1) traditional; (2) affectual (emotional) faith; (3) value-rational (including ethical); and (4) legal (positive enactment).¹⁶⁸ Rationalization, however, has minimized the first three types. "Today," Weber claims, "the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner."¹⁶⁹ In other words, legality under Weber's understanding of the modern paradigm is that which is produced from following the recognized procedures constituting positive enactment; no substantive criteria of justice must be met.

Legality, in this sense, constitutes legitimacy either because "it derives from a voluntary agreement of the interested parties" or because "it is imposed by an authority which is held to be legitimate and therefore meets with compliance."¹⁷⁰ The distinction between legitimacy by voluntary agreement and by the imposition of authority is relative. For example, in majoritarian democracies, the majority often imposes its agreement on the dissenting minority.¹⁷¹ In addition, legality—whether democratically determined or not—can be reduced to compliance with the procedures believed to be legitimate in the existing regime.¹⁷² In a rationalized society, many spheres of life—economic, bureaucratic, and legal—will be legitimized by

165. 2 MAX WEBER, *ECONOMY AND SOCIETY* 1401, 1402 (Guenther Roth & Claus Wittich eds., 1978) [hereinafter 2 WEBER, *ECONOMY AND SOCIETY*].

166. WEBER, *THE PROTESTANT ETHIC*, *supra* note 145, at 26.

167. *Id.*

168. 1 MAX WEBER, *ECONOMY AND SOCIETY* 36 (Guenther Roth & Claus Wittich eds., 1978).

169. *Id.* at 37.

170. *Id.* at 36.

171. *Id.* at 37.

172. Jürgen Habermas, *Law and Morality*, in 8 *THE TANNER LECTURES ON HUMAN VALUES* 219 (Sterling M. McMurrin ed., Kenneth Baynes trans., 1988) [hereinafter Habermas, *Law and Morality*].

legality because the other bases of legitimation, whether value-rational (moral, religious, metaphysical), traditional, or emotional, have been substantially diminished by the rationalization or secularization of society.

As noted above in Part B, Weber's understanding of the modern paradigm results in the complete separation of law and religion. Religion makes only subjectively rational claims and has been relegated to the private or subjective realm by the secularization of society. Once religious and metaphysical world views have been eliminated as a justification for law, law must have its own independent, rational justification. Thus, under the modern paradigm, the law is autonomous from religion.

IV. TWO CRISES FOR THE MODERN PARADIGM: LEGAL INDETERMINACY AND THE ONTOLOGICAL GAP

Positing paradigms of law and religion as a useful tool for identifying the key assumptions relating to the legitimation of law should not be taken to suggest that identifying and evaluating paradigms of law and religion is obvious or straight forward. In *The Structure of Scientific Revolutions*, Thomas S. Kuhn emphasizes the difficulty of analyzing paradigms because they constitute the "criterion for choosing problems that, while the paradigm is taken for granted, can be assumed to have solutions."¹⁷³ Kuhn further argues that a paradigm is "like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions."¹⁷⁴ This taken for granted nature of paradigms makes them difficult to analyze and resistant to change. Kuhn stresses that paradigms can "even insulate the community from those socially important problems that are not reducible to the puzzle form, because they cannot be stated in terms of the conceptual and instrumental tools the paradigm supplies."¹⁷⁵ These paradigms constitute "incommensurable ways of seeing the world and of practicing science in it."¹⁷⁶

For example, notwithstanding Moore's homily noted in the introduction, the Alabama Court of the Judiciary reaffirmed the modern paradigm by unanimously removing Moore as Chief Justice of the Alabama Supreme Court because he "not only willfully and publicly defied the orders of a United States district court" to remove the Ten Commandments monument but also indicated that in the future "he would do the same."¹⁷⁷ Moore failed to convert his fellow judges to the pre-modern paradigm and thereby establish the Judeo-Christian God as the final authority under Alabama law. In other words, from inside the modern paradigm, Former Chief Justice Moore's position cannot challenge the secular foundation of law but must be classified as an Establishment Clause violation. Law locates and

173. Kuhn, *supra* note 1, at 37.

174. *Id.* at 23.

175. *Id.* at 37.

176. *Id.* at 4.

177. In the Matter of: Roy S. Moore Chief Justice of the Supreme Court of Alabama, Court of the Judiciary Case No. 33, at 12.

isolates religion outside of the secular legal scheme. Accordingly, given the prevailing authority of the modern paradigm, legal scholars have generally been blinded from seeing that advocating a Christian foundation for U.S. law signals a direct challenge to the secular foundation of law and a return to a pre-modern paradigm of law and religion.

For new paradigms to become visible, Kuhn maintains “that crises are a necessary precondition for the emergence of novel theories” and that “once it has achieved the status of paradigm, a scientific theory is declared invalid only if an alternative candidate is available to take its place.”¹⁷⁸ Once these problems become acute, a new paradigm can gain acceptance if it is successful at solving some of these acute problems.¹⁷⁹ Kuhn emphasizes, however, that “even severe and prolonged anomalies” will not result in falsifying a paradigm.¹⁸⁰ A paradigm becomes “invalid only if an alternative candidate is available to take its place” because “[t]he decision to reject one paradigm is always simultaneously the decision to accept another.”¹⁸¹

Assuming Kuhn’s analysis of scientific paradigms holds for paradigms about law and religion, the purpose of this Section will be to introduce two quandaries or crises for legal theory—legal indeterminacy and the ontological gap between legal theory and legal practice. These two quandaries call into question the modern paradigm and its notion of secularization of the law. Section IV will also argue that deconstructive postmodern thought functions mainly as a critique of the modern paradigm rather than proposing a third paradigm of law and religion. Deconstructive postmodern thought does not constitute a paradigm because it fails to provide a normative theory of law explaining the legitimation of law and indicating law’s relationship to religion. If these crises turn out to be significant, this article will have paved the way for the emergence of a new constructive postmodern paradigm for law and religion that provides a normative theory of law that can reconcile legal indeterminacy, the comprehensive nature of religion, and religious pluralism while closing the ontological gap between legal theory and legal practice. A more detailed account of this new constructive postmodern paradigm will have to wait for a subsequent article entitled *Beyond Theocracy and Secularism (Part II): A New Paradigm for Law and Religion*.

A. *The Advent of Legal Indeterminacy*

The first important quandary or crisis for the modern paradigm concerns the juxtaposition of the overwhelming consensus that the law is indeterminate with the lack of consensus regarding the normative justification of the law under the conditions of legal indeterminacy. There is also little consensus about the degree or scope of legal indeterminacy. For example,

178. Kuhn, *supra* note 1, at 77.

179. *Id.* at 23.

180. *Id.* at 77.

181. *Id.*

extreme-radical deconstructionists such as Anthony D'Amato have argued that even the U.S. constitutional requirement that the President be thirty-five years of age is not an easy case (i.e., indeterminate).¹⁸² On the other extreme, even contemporary legal formalists, such as Ernest Weinrib, claim that "[n]othing about formalism precludes indeterminacy."¹⁸³ Weinrib argues that "formalism does not rely on the antecedent determinacy for particular cases of the concepts entrenched in positive law," but that "the organ of positive law has the function of determining an antecedently indeterminate controversy."¹⁸⁴ Consequently, in its weaker forms, the indeterminacy thesis merely signals the almost universal rejection of strong legal formalism.

Christopher Columbus Langdell is often considered the archetype of strong legal formalism.¹⁸⁵ He regarded law as a science and claimed that "all the available materials of that science are contained in printed books."¹⁸⁶ Langdell further argued that common law cases could be reduced to a formal system and that the judge, like a technician, could determine the right decision as a matter of deductive logic by pigeonholing cases into the formal system.¹⁸⁷ In other words, strong legal formalism maintains that legal decision making is essentially a deductive process whereby the application of legal rules results in determinative outcomes from the constraints imposed by the language of the law.¹⁸⁸ Strong legal formalism thus provided a formidable argument that under the modern paradigm, judges can decide cases independently of extra-legal norms from morality, politics, and religion.

To the contrary, both the Legal Realists and the Critical Legal Studies Movement ("CLS") have forcefully undermined the feasibility of strong legal formalism by demonstrating the indeterminacy of the law. In fact, the origin of the consensus about the indeterminacy of the law can be traced back to the legal realists critique of Langdell and other strong legal formalists.¹⁸⁹ For example, Karl Llewellyn rejects deductive legal certainty and

182. D'Amato, *supra* note 23, at 250. D'Amato notes that "[d]econstructionists say that all interpretation depends on context. Radical deconstructionists add that, because contexts can change, there can be no such thing as a single interpretation of any text that is absolute and unchanging for all time." *Id.* at 252; see also Anthony D'Amato, *Aspects of Deconstruction: The Failure of the Word "Bird"*, 84 Nw. L. Rev. 536 (1990).

183. Weinrib, *supra* note 23, at 1008.

184. *Id.*

185. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42-43 (1977).

186. ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 175 (1967). For further discussion of the dominance of strong legal formalism from the Civil War to World War I, see GILMORE, *supra*, note 185, at 41-67.

187. See *id.* at 43-44.

188. Cf. MICHEL ROSENFELD, *JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS* 33 (1998) (discussing the "new" versus the "old" legal formalism); see also David A. Strauss, *The Role of a Bill of Rights*, 59 U. CHI. L. REV. 539 (1992). In discussing the conception of the Bill of Rights as a Code, Strauss defines formalism as including "three things: a heavy reliance on the precise language of the text; a pretense that the text resolves more issues than it actually does; and an effort to shift responsibility for a decision away from the actual decisionmaker and to some other party, such as the Framers." *Id.* at 544.

189. GILMORE, *supra*, note 185, at 42-43.

argues that “legal rules do not lay down any *limits within* which a judge moves.”¹⁹⁰ Llewellyn further maintains that:

a legal rule functions not as a closed space within which one remains, but rather as a bough whose branches are growing; in short, as a guideline and not as a starting premise; not as inflexible iron armor which constrains or even forbids growth, but as a skeleton which supports and conditions growth, and even promotes and in some particulars liberates it.¹⁹¹

For legal realists, this understanding of legal rules entails a rule scepticism that recognizes the indeterminacy of law.

CLS is also well known for its deconstructive critique of legal formalism and claims for radical indeterminacy of the law. Along with feminist legal theory and critical race theory, it rejects not only strong legal formalism but also any attempt to find a rational principle that can resolve legal indeterminacy. These deconstructive critiques disavow the possibility of an apolitical legitimation of law and mainly focus on deconstructing the law to identify its hidden biases relating to race, gender, and class.¹⁹² As a proponent of CLS, Mark Kelman concludes “that the legal system is invariably simultaneously *philosophically committed* to mirror-image contradictory norms, each of which dictates the opposite result in any case (no matter how ‘easy’ the case first appears)” and that “settled *justificatory schemes* are in fact unattainable.”¹⁹³

Although there is little consensus about nature and degree of legal indeterminacy,¹⁹⁴ most legal theorists have come to accept that the law is indeterminate such that there are hard cases where the apparently relevant statutes, common law, contracts, or constitutional law provisions at issue do

190. KARL N. LLEWELLYN, *THE CASE LAW SYSTEM* § 56, at 80 (Paul Gewirtz ed., Michael Ansaldi trans., 1989).

191. *Id.*

192. Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Sense*, 44 *VAND. L. REV.* 1, 6 (1991) (arguing that “areas of law ostensibly designed for our benefit often benefit whites even more than blacks”); Roberto M. Unger, *The Critical Studies Movement*, 96 *HARV. L. REV.* 563, 567 (1983) (rejecting that law and morality can be based on an apolitical method or procedure of justification and arguing that the legal order is merely the outcome of power struggles or practical compromises); Robin West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1, 1-3, 14 (1988) (maintaining that masculine jurisprudence proceeds from the presupposition of individuals as essentially separate from one another (“separation thesis”) while feminist jurisprudence proceeds from the presupposition that individuals are essentially connected or related to one another (“connection thesis”)).

193. MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 13 (1987).

194. For example, Ken Kress notes that:

[V]ersions of indeterminacy differ according to whether they claim that the court has complete discretion to achieve any outcome at all (execute the plaintiff who brings suit to quiet title to his cabin and surrounding property in the Rocky Mountains) or rather has a limited choice among a few options (hold for defendant or plaintiff within a limited range of monetary damages or other remedies), or some position in between.

not clearly resolve the dispute. For example, the indeterminacy of the U.S. Constitution results in many hard cases where judges arrive at conflicting decisions about the Constitution's implications for abortion, physician-assisted suicide, and same-sex marriage. Ken Kress has noted that "[t]he indeterminacy thesis asserts that law does not constrain judges sufficiently, raising the specter that judicial decision making is often or always illegitimate."¹⁹⁵ Judges must rely on extra-legal norms to resolve hard cases which can result in inconsistent treatment of like cases and arbitrary decisions.

Does this mean that judicial decision making is merely an arbitrary exercise of political power? Or is it just the product of the particular life experience of the judge?¹⁹⁶ Lawrence Solum responds that

if the indeterminacy thesis is true, then legal justice will fall short of the ideal of the rule of law in at least three ways: (1) judges will rule by arbitrary decision, because radically indeterminate law cannot constrain judicial decision; (2) the laws will not be public, in the sense that the indeterminate law that is publicized could not be the real basis for judicial decision; and (3) there will be no basis for concluding that like cases are treated alike, because the very ideal of legal regularity is empty if law is radically indeterminate.¹⁹⁷

Moreover, in a democratic society, this means that judges are allegedly subverting democratic rule by creating the law outside of the legislative process and that judicial decision making is illegitimate. Consequently, the indeterminacy thesis puts into question the notion of the "Rule of Law" and the autonomy of law presupposed by the modern paradigm.

Contemporary legal theory, however, fails to indicate how law can be rationally legitimated under the conditions of legal indeterminacy. There have been three types of unsatisfactory response to legal indeterminacy. First, some legal theorists have attempted to reject the legal indeterminacy thesis or to propose a normative theory of law to maintain the modern paradigm's autonomous legitimation of law. Section V will consider attempts by Max Weber and John Rawls to maintain the modern paradigm

195. *Id.* at 203.

196. Jerome Frank is well known for his claim that judicial decisions can, in principle, be explained by a psychoanalysis of a judge's life experiences. See generally JEROME FRANK, *LAW AND THE MODERN MIND* (Peter Smith 1970) (1930). He comments that:

What we may hope some day to get from our judges are detailed autobiographies containing the sort of material that is recounted in the autobiographical novel; or opinions annotated, by the judge who writes them, with elaborate explorations of the background factors in his personal experience which swayed him in reaching his conclusions. For in the last push, a judge's decisions are the outcome of his entire life-history.

Id. at 123-24.

197. Lawrence B. Solum, *Indeterminacy*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 489 (Dennis Patterson ed., 1996).

by rejecting legal indeterminacy and Jürgen Habermas's attempt to reconcile the modern paradigm's notion of secularization with legal indeterminacy.

In addition, legal positivists usually recognize legal indeterminacy but fail to explain how judges provide a rational legitimation for the law in hard cases. For instance, H. L. A. Hart advocates a middle path between formalism and rule skepticism such that the indeterminacy of the law allows for "varied types of reasoning which courts characteristically use in exercising the creative function left to them by the open texture of law in statute or precedent."¹⁹⁸ Hart clarifies that this open texture or indeterminacy concerns not only "particular legal rules," but also "the ultimate criteria of validity," which he refers to as "the rule of recognition."¹⁹⁹ With respect to the rule of recognition, this results in a paradoxical situation where courts are determining the ultimate criteria of legal validity in the process of deciding whether a particular law is valid.²⁰⁰ Hart claims that "the law in such cases is fundamentally *incomplete*: it provides *no* answer to the questions at issue in such cases" and that courts must exercise the restricted law-making function which he refers to as discretion.²⁰¹ As a result, in hard cases, the judge "is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases."²⁰²

Finally, CLS, feminist legal theory, and critical race theory appear to give up on a rational legitimation for law altogether and reduce law to politics.²⁰³ As a proponent of CLS, Roberto Unger rejects the claims that

198. H.L.A. HART, *THE CONCEPT OF LAW* 144 (2d ed. 1989). Hart notes that the rule of recognition can be partly, but never completely, indeterminate. *Id.* at 148. For example, in the United States, the United States Constitution could be indeterminate in some sense, but the rule of recognition conferring authority (jurisdiction) on the court to exercise its creative powers to settle the ultimate criteria of validity raises no doubts even though the precise scope of that power may raise some doubts. *See id.* at 152.

199. *Id.* at 148.

200. *Id.* at 152.

201. *Id.* at 252 (emphasis in original).

202. *Id.* at 273. While denying that legal pragmatism is similar to Hart's legal positivism, Richard Posner vigorously rejects legal formalism—the idea of "law as a system of rules and judicial decisions as the result of deduction, with the applicable rule supplying the major, and the facts of the particular case the minor, premise of syllogism." RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 19 (2003). Rather, "[l]egal pragmatism is forward-looking, regarding adherence to past decisions as a (qualified) necessity rather than as an ethical duty." *Id.* at 60. Posner emphasizes that "[t]he ultimate criterion of pragmatic adjudication is reasonableness," which tries to achieve the "right balance between rule-of-law and case-specific consequences, continuity and creativity, long-term and short-term, systemic and particular, rule and standard." *Id.* at 59, 64. Posner's legal pragmatism thus considers "systemic and not just case-specific consequences," so that it takes into account "standard rule-of-law virtues of generality, predictability, and impartiality," but pragmatic judges only rarely "give controlling weight to systemic consequences as legal formalism does." *Id.* at 12, 59, 61.

203. David Kairys argues that:

The lack of required, legally correct rules, methodologies, or results is in part a function of the limits of language and interpretation, which are subjective and value laden. More importantly, indeterminacy stems from the reality that the law usually embraces and legitimizes many or all of the conflicting values and interests involved in controversial issues and a wide and conflicting array of "logical" or "reasoned" arguments and strategies of argumentation, without providing any legally required hierarchy of values or arguments or any required method for

law and morality can be based on an apolitical method or procedure of justification and that the legal system can be objectively defended as embodying an intelligible moral order. The legal order is merely the outcome of power struggles or practical compromises.²⁰⁴ He thus advocates “the purely instrumental use of legal practice and legal doctrine to advance leftist aims.”²⁰⁵ Similarly, Robin West claims that masculine jurisprudence proceeds from the presupposition of individuals as essentially separate from one another (“separation thesis”) while feminist jurisprudence proceeds from the presupposition that individuals are essentially connected or related to one another (“connection thesis”).²⁰⁶ Critical Race Theorists have also tried to show that “areas of law ostensibly designed for our benefit often benefit whites even more than blacks.”²⁰⁷

Given these responses, the modern paradigm can not likely maintain the autonomy of law from political, moral and religious convictions. Legal indeterminacy creates a crisis and still constitutes “the key issue in legal scholarship today,”²⁰⁸ because it potentially calls into question the modern paradigm and its notion of secularization. In other words, legal indeterminacy raises a crucial normative question that the modern paradigm has failed to answer: on what rational normative basis do judges determine which extra-legal norms are valid and which valid norm or norms are controlling in deciding hard cases? In Section V, I will show that attempts to by Weber and Rawls to deny legal indeterminacy fail as well as Habermas’s attempt to reconcile legal indeterminacy and the modern paradigm.

B. Why Deconstructive Postmodern Thought Does Not Provide a Third Paradigm

Before considering attempts to defend the modern paradigm from the crisis of legal indeterminacy, some may wonder whether the previous analysis has overlooked a third paradigm—a deconstructive postmodern paradigm (no foundation for law)—as an alternative to the modern paradigm. For example, Step Feldman sets forth three stages of American legal thought including premodern (“religiously rooted natural law”), modern (ranging “from rationalism to empiricism to transcendentalism”), and postmodern (nonfoundational, interdisciplinary, paradoxical, power-focused, socially-constructed, and self-reflexive).²⁰⁹ Deconstructive postmodern thought certainly poses a challenge to the modern paradigm

determining which is most important in a particular context. *Judges then make choices, and those choices are most fundamentally value based, or political.*

David Kairys, *Introduction*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 4 (David Kairys ed., 3d ed. 1998) (emphasis added).

204. Unger, *supra* note 192, at 565.

205. *Id.* at 567.

206. Robin West, *supra* note 192, at 1-3, 14.

207. Richard Delgado, *supra* note 192, at 6. See also Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

208. Anthony D’Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV., 148, 148 (1990).

209. STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 51, 163-76 (2000).

by more fully articulating the challenge of legal indeterminacy first expressed by legal realism and by adding an emphasis on the conflicting norms within the law. It also discloses that the modern paradigm's notion of legal autonomy requires presupposing legal formalism and a mechanical notion of legal reasoning. Given the widespread consensus that this deconstructive critique successfully undermines the autonomy of law, any new paradigm must take legal indeterminacy as a given.

However, the deconstructive postmodern critique fails to provide a solution to the crisis of legal indeterminacy. As noted above, Kuhn emphasizes that "even severe and prolonged anomalies" will not result in falsifying a paradigm.²¹⁰ A paradigm becomes invalid only when another paradigm takes its place. The deconstructive postmodern critique only insists that "law has no foundation,"²¹¹ Rather than specifying a new normative legal theory, it operates mainly as a critique of the modern paradigm without specifying how to legitimate the law under the conditions of legal indeterminacy.

Even though the deconstructive critique attempts to deny that the law has any foundation, Jack Balkin maintains that "deconstructive argument encourages us to recognize a transcendent value of justice" that acts as a standard for evaluating the current legal system in order to ameliorate any injustice.²¹² He emphasizes that "deconstructive techniques (for example, the inversion of conceptual hierarchies and the concept of iterability) have no necessary ethical stance."²¹³ He recognizes that "deconstructive argument is a species of rhetoric" that "can be used for good or for ill depending on how it is wielded."²¹⁴ But Balkin stresses that legal theorists have failed to recognize that deconstruction in the legal context differs from deconstruction in the literary context. Literary deconstructionists "were using deconstruction to show the impenetrability, mutability, and conceptual incoherence of all texts, not simply the texts produced by political conservatives."²¹⁵ By contrast, Balkin points out that

[l]egal theorists were primarily interested in using deconstruction for *normative critical purposes*. They wanted to criticize some (but not other) doctrinal distinctions as incoherent, they wanted to show that some (but not other) parts of the law were unjust and needed reform, and they wanted to demonstrate that some (but not other) ways of thinking had undesirable ideological effects that concealed important

210. Kuhn, *supra* note 1, at 77.

211. Anthony Carty, *Introduction: Post-Modern Law, POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN 6* (Anthony Carty ed., 1990).

212. Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 739 (2005).

213. *Id.* at 738.

214. *Id.*

215. *Id.* at 720.

features of social life and therefore promoted or sustained injustices.²¹⁶

Consequently, legal scholars had to modify deconstruction for these normative purposes but often misunderstood what that entailed.

“If we deconstruct law for a critical purpose,” Balkin stresses, “it must be because we believe that there is some gap or divergence between the law and what justice requires.”²¹⁷ Critical deconstruction presupposes that the law fails to meet some standard of justice. The deconstructive critique thus presupposes an unacknowledged foundation. Balkin concludes that “the critical use of deconstruction becomes ‘transcendental’ deconstruction, because it must presuppose the existence of transcendent human values articulated in culture but never adequately captured by culture.”²¹⁸

Balkin’s comments suggest that there is an unarticulated constructive agenda presupposed by the critical use of deconstruction in law. By not treating the deconstructive postmodern critique as a paradigm, I am maintaining that articulating this constructive agenda is necessary for something to count as a paradigm. In the current discussion, articulating these presuppositions would result in a “constructive postmodern” paradigm of law and religion. Philosopher David Ray Griffin refers to this type of approach as “constructive or revisionary postmodernism.”²¹⁹ Griffin’s use of the term “postmodernism” helps clarify what I mean by this term. He does not take the term postmodern to suggest adopting certain philosophical notions like non-foundationalism. Rather, constructive postmodernism attempts “to overcome the modern worldview not by eliminating the possibility of worldviews as such [i.e., deconstructive postmodernism], but by constructing a postmodern worldview through a revision of modern premises and traditional concepts.”²²⁰ Alternatively, Dennis Patterson defines postmodern thought as “‘any mode of thought that departs from the three modern axes . . . without reverting to premodern categories.’”²²¹

216. *Id.* at 721 (emphasis added).

217. *Id.* at 739.

218. *Id.* See also J. M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 94 MICH. L. REV. 1131 (1994) (arguing that the presupposed transcendent value of justice is “transcendental” because it is necessarily presupposed by deconstructive arguments about justice).

219. David Ray Griffin, *Introduction to SUNY Series in Constructive Postmodern Thought, in FOUNDERS OF CONSTRUCTIVE POSTMODERN PHILOSOPHY* vii, viii (David Ray Griffin, John B. Cobb, Jr., Marcus P. Ford, Pete A. Y. Gunter, & Peter Ochs 1993).

220. *Id.* (arguing for a constructive postmodernism based on the philosophy of Alfred North Whitehead that “involves a new unity of scientific, ethical, aesthetic, and religious intuitions”). See also Zhihe Wang, *The Postmodern Dimension of Whitehead’s Philosophy and Its Relevance, in WHITEHEAD AND CHINA: RELEVANCE AND RELATIONSHIPS* 173-87 (Wenyu Xie, Zhihe Wang, & George E. Derfer eds., 2005) (maintaining that aspects of Whitehead’s Philosophy justify characterizing Whitehead as a constructive “postmodern thinker”).

221. DENNIS PATTERSON, *LAW AND TRUTH* 158 (1996) (quoting Nancey Murphy & James McClendon, *Distinguishing Modern and Postmodern Theologies*, 5 MOD. THEOLOGY 191, 199 (1989)). Patterson defines the three axes of modernism as follows: 1) “Epistemological foundationalism—Knowledge can only be justified to the extent it rests on indubitable foundations”; 2) “Theory of language—Language has two functions: it represents ideas or states of affairs, or expresses the attitudes of

Similar to both of these notions, I will use the term “constructive postmodern paradigm” to indicate a paradigm that seeks to overcome the two crises for the modern paradigm—legal indeterminacy (i.e., deconstructive postmodern legal thought) and the ontological gap—by revising aspects of the modern and pre-modern paradigms of law and religion. Thus, my thesis is that a new constructive postmodern paradigm is needed to provide a normative theory of law that can reconcile legal indeterminacy, the comprehensive nature of religion, and religious pluralism, while closing the ontological gap between legal theory and legal practice.

C. *The Ontological Gap*

The second issue demonstrating the need for a new paradigm of law and religion stems from the disconnection between legal practice and legal theory. Steven Smith argues that this disconnection stems from an ontological gap between the metaphysical presuppositions informing the practice of law and the “anti-metaphysical animus” informing contemporary legal theory which has resulted in “a jurisprudential dead end.”²²² Smith emphasizes that “[t]he ways in which lawyers and judges (and even most legal scholars) actually practice and talk about law are not so different than they were a century ago—or even five centuries ago.”²²³ The contemporary practice of law still presupposes a classical or religious ontology that maintains “the reality of ‘the law’” and that posits “a sort of working partnership between a divine author and human legislators.”²²⁴ However, he maintains that the classical “account has been widely rejected by modern legal thinkers as mere ‘superstition.’”²²⁵ As a result, the religious ontology presupposed by the practice of law is contrary to the ontology presupposed by contemporary legal theory.

More specifically, Smith identifies “three ontological families,” which he labels “everyday ontology,” “scientific ontology,” and “religious ontology.” Smith argues that “‘the law’ . . . does not square with either the everyday ontology or the scientific ontology that people in academic settings regard as axiomatic, at least for professional purposes.”²²⁶ This clarifies that the ontological gap results because the practice of law presupposes a religious ontology while contemporary legal theory presupposes a scientific ontology.

The ontological gap presents a problem because the end result of accepting a scientific ontology based on “atomic physics and Darwinian evolution,” “is that the religious worldview is inadmissible for purposes of

the speaker”; and 3) “Individual and community—‘Society’ is best understood as an aggregations of ‘social atoms.’” *Id.* at 153 (quoting Murphy & McClendon, *supra*, at 199).

222. Smith, *supra* note 11, at xii.

223. *Id.* at 1.

224. *Id.* at 155.

225. *Id.*

226. *Id.*

serious thought.”²²⁷ To support this claim, Smith cites John Searle’s conclusion that an unassailable scientific ontology (i.e., scientific materialism) invalidates religious ontology. Smith’s argument means that legal practice is based on a defective or faulty religious ontology that lacks “academic” credibility. Given this analysis, the question becomes whether the ontological gap between legal practice and legal theory constitutes an unfathomable chasm that cannot be traversed or whether it can be navigated by reforming centuries of legal practice or by positing a new religious ontology for legal theory.

Smith’s argument resonates with an increasing focus on ontological and religious foundations in political theory and legal theory. In political theory, Stephen K. White identifies a weak ontology in the work of Judith Butler, William Connolly, George Kateb, and Charles Taylor.²²⁸ White argues that this weak ontology is important for Western notions of human rights because “our ideas of human dignity, basic equality, and respect,” (i.e., the figuration of human being) are required to “see why we might be creatures that share the sort of connectedness and commonality that gives distinctive force to the idea of humanity and makes us out to be creatures peculiarly worthy of rights.”²²⁹ With respect to legal theory, Michael Perry has recently argued “[t]hat there is a religious ground for the morality of human rights—indeed, more than one—is clear.”²³⁰ Perry further concludes that those rejecting a religious ground may have “no ground for the morality of human rights, no warrant for the claim that every human being has inherent dignity and is inviolable,” because “Nietzsche’s thought (‘not only no God, but no metaphysical order of any kind’) and the morality of human rights . . . are deeply antithetical to one another.”²³¹

Perry’s analysis suggests an option that Smith does not consider. Closing the ontological gap may require a return to a religious foundation for law. Smith seems to be viewing the available options through the modern paradigm and its notion of secularization. Alternatively, bridging the ontological gap may require a new constructive postmodern paradigm that maintains that a plurality of religious convictions implicitly legitimates the law. The constructive postmodern paradigm does not propose, in Smith’s terms, a unitary religious ontological foundation for law. Rather, it claims that each individual interpreting the law presupposes a religious ontological foundation. As noted in Part A, Ogden’s definition of religion makes

227. *Id.* at 34.

228. See generally STEPHEN K. WHITE, *SUSTAINING AFFIRMATION: THE STRENGTHS OF WEAK ONTOLOGY IN POLITICAL THEORY* (2000).

229. Stephen K. White, *Weak Ontology: Genealogy and Critical Issues*, 7 HEDGEHOG REV. 11, 23 (2005) (Special Issue including articles by Judith Butler, William Connolly, George Kateb, and Charles Taylor, and others regarding *Commitments in a Post-Foundationalist World: Exploring the Possibilities of “Weak Ontology”*).

230. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS*, *supra* note 9, at xi. See also PERRY, *THE IDEA OF HUMAN RIGHTS*, *supra* note 95, at 29 (arguing that “if—the conviction that every human being is sacred is inescapably religious, it follows that the idea of human rights is ineliminably religious, because the conviction is an essential, even foundational, constituent of the idea”).

231. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS*, *supra* note 9, at 26, 29.

clear that religious convictions are the comprehensive condition of validity that are presupposed by any normative judgment. Religious convictions include both an ethical aspect (a notion of authentic human existence) and a metaphysical aspect (the meaning of ultimate reality for us).²³² Consequently, as Smith's argument implicitly acknowledges, each act of legal interpretation presupposes a religious ontology and notion of authentic human existence. Taken collectively, there is a plurality of religious ontologies implicitly legitimating the law.

V. THREE VERSIONS OF THE MODERN PARADIGM: MAX WEBER, JOHN RAWLS, AND JÜRGEN HABERMAS

The different theories of law under the modern paradigm all attempt to preserve the autonomy of law so that law has a secular foundation. This Section and Section VI will discuss the theories of law proposed or implied by Max Weber, John Rawls, and Jürgen Habermas, and French secularism. In their own way, each of these theories of law aspires to make the law secular or neutral as among different religious convictions so that the state does not favor one religion over others. While this aspiration is admirable, I will show that the four main ways of trying to secure the autonomy of law from religion fail for one or several of the following reasons: 1) they deny legal indeterminacy; 2) they are incoherent; or 3) they require establishing a comprehensive secularism in violation of a proper understanding of religious pluralism and the Establishment Clause. My critiques of these positions will be fairly brief but will refer to longer critiques of several of these positions in previous articles.

A. Weber's Legal Positivism and Legal Formalism

Max Weber's positivistic theory of law²³³ sets forth the classic statement of the modern paradigm. Based on his descriptive account of the rationalization or secularization of law, Weber claims that law can be legitimated by its legality. Legality, as discussed above, merely means that a formal process of positively enacting law (via certain procedures that are *believed* to be legitimate in the existing regime) was followed. No substantive criteria of justice must be met. Further, law cannot draw any legitimizing force from morality or from comprehensive religious or metaphysical worldviews.²³⁴ The rationalization of society and law has eliminated these traditional or value-rational bases of legitimation. Law possesses its own

232. See *supra* note 111.

233. In the legal context, positivism usually means that law is not legitimated by morality (rational normative justification) but is legitimated by following the established formal procedures for enacting a law (facticity). In other words, the primary purpose of legal theory is descriptive (including the process of normative justification) rather than normative. See, e.g., HART, *supra* note 198, at 240 (claiming in the new appendix to *THE CONCEPT OF LAW* that his "account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in [his] general account of law") (emphasis in original).

234. Habermas, *Law and Morality*, *supra* note 172, at 219; 1 HABERMAS, *THEORY OF COMMUNICATIVE ACTION*, *supra* note 160, at 259.

independent rationality; it is not reducible to morality or political power. “[L]aw is precisely what the political legislator—whether democratic or not—enacts as law in accordance with a legally institutionalized procedure.”²³⁵ Weber detaches law from moral-practical rationality and reduces law to that which was positively enacted according to the accepted procedures.²³⁶

In addition, Weber argues that the secularization or rationalization of law finally leads to a formalistic system of law. In its ideal form, law becomes a “legal science,” which maximizes the calculability of social action by maximizing the use of instrumental rationality. Legal science has “the highest measure of methodological and logical rationality” that Weber summarizes in five postulates.²³⁷

1. “every concrete legal decision be the ‘application’ of an abstract legal proposition to a concrete ‘fact situation’;”
2. “it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic;”
3. “the law must actually or virtually constitute a ‘gapless’ system of legal propositions, or must, at least, be treated as if it were such a gapless system;”
4. “whatever cannot be ‘construed’ rationally in legal terms is also legally irrelevant; and”
5. “every social action must always be visualized as either an ‘application’ or ‘execution’ of legal propositions, or as an ‘infringement’ thereof.”²³⁸

For Weber, the “‘gaplessness’ of the legal system” results “in a gapless ‘legal ordering’ of all social conduct” so that the law is sealed off from morality, politics, and religion.²³⁹ This “[j]uridical formalism enables the legal system to operate like a technically rational machine.”²⁴⁰ As noted in the discussion of Langdell’s theory above, mechanical accounts of jurisprudence like Weber’s are often referred to as strong legal formalism because they posit such a strong deductive character of judicial decision making and a strong autonomy of law from politics, morality, and religion.²⁴¹ Without this strong legal formalism, “the juristic precision of judicial opinions will be seriously impaired if sociological, economic, or ethical argument were to take the place of legal concepts.”²⁴² Weber’s classic statement of secularization makes clear that the autonomy of law presupposes a strong legal

235. Habermas, *Law and Morality*, *supra* note 172, at 219.

236. 1 HABERMAS, *THEORY OF COMMUNICATIVE ACTION*, *supra* note 160, at 262.

237. 1 WEBER, *ECONOMY AND SOCIETY*, *supra* note 168, at 657.

238. *Id.* at 657-58.

239. *Id.* at 658.

240. *Id.* at 811.

241. See text accompanying notes 185-188 (discussing and criticizing Langdell’s strong legal formalism).

242. 1 WEBER, *ECONOMY AND SOCIETY*, *supra* note 168, at 894.

formalism to prevent religious, moral, political, or other non-legal arguments from compromising the autonomy of law during its application. Consequently, unlike most contemporary legal theorists, Weber understands that the secularization of law can only be sustained during the application of law by strong legal formalism.

Despite his reliance on Weber's theory of rationalization or secularization of the law, Habermas rejects positivistic theories of law and strong legal formalism. For example, Habermas shows that Weber's theory of legality as legitimacy is circular. According to Habermas, "[i]t remains unclear how the *belief in legality* is supposed to summon up the force of legitimation if legality means only conformity with an actually existing legal order, and if this order, as arbitrarily enacted law, is not in turn open to practical-moral justification."²⁴³ This belief in legality merely presupposes that the legal order is legitimate. In other words, a belief that certain procedures will produce valid laws does not make it so; "the belief in legality does not *per se* legitimize."²⁴⁴ Those procedures must themselves be legitimized. Weber theory is fatally circular because he merely presupposes or *believes in* their validity.²⁴⁵

Despite these fatal flaws, Weber's positivistic theory of law shows that one of the founders of secularization theory thought that strong legal formalism was essential for preserving the autonomy of law. In an absolute sense, Weber appears right that without strong legal formalism, judges can

243. 1 HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 160, at 265 (emphasis added). See also JÜRGEN HABERMAS, LEGITIMATION CRISIS 97-99 (Thomas McCarthy trans., 1975) [hereinafter HABERMAS, LEGITIMATION CRISIS]. See also John P. McCormick, *Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises of the State*, 9 YALE J. L. & HUMAN. 297, 311 (1997) (arguing that "the riddle of whether mere legality could entail legitimacy" left unresolved by Weber's "thin notion of legal validity" is central to Habermas's analysis of law); David Ingram, *The Subject of Justice in Postmodern Discourse: Aesthetic Judgment and Political Rationality*, in HABERMAS AND THE UNFINISHED PROJECT OF MODERNITY: CRITICAL ESSAYS ON THE PHILOSOPHICAL DISCOURSE OF MODERNITY (Maurizio Passerin d'Entrèves & Seyla Benhabib eds. 1997) (arguing that "Habermas's critical philosophy seeks to justify modernity in the face of Weber's paradoxes: the relativism of rational value spheres that ostensibly gives rise to social pathology and the identifications of social rationalization with capitalism").

244. HABERMAS, LEGITIMATION CRISIS, *supra* note 243, at 99; JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 202 (William Rehg trans., 1996). Alternatively, Harold Berman criticizes Weber's legal positivism for different reasons. He maintains that Weber's

misunderstanding of religion . . . especially of sixteenth- and seventeenth-century Lutheran and Calvinist Protestantism in Germany and England, respectively, was coupled with a misunderstanding of the legal developments that took place in those countries during those centuries, and in both cases this was due to the fallacy of his sharp separation of fact from value and of his strict positivist view of law as fact alone and as primarily an instrument of political coercion.

BERMAN, LAW AND REVOLUTION II, *supra* note 31, at 28.

245. Habermas's argument also applies to other positivistic theories because they also define legality merely in terms of a set of existing formal procedures without legitimizing those procedures. See, e.g., HART, THE CONCEPT OF LAW, *supra* note 198, at 110, 101 (arguing that the rule of recognition is the criteria that determines the validity of laws in the legal system but "its existence is a matter of fact" so that "[f]or the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisors.").

rely on personal moral, political, and religious beliefs in hard cases. The widespread rejection of strong legal formalism alone should raise serious questions about the continued viability of the modern paradigm. Consequently, the modern paradigm may have remained in place not because legal scholars think the autonomy of law is feasible but because no adequate paradigm has yet been offered to take its place.

B. *John Rawls's Political and Legal Liberalism*²⁴⁶

John Rawls's political and legal liberalism embraces the modern paradigm and relies on a normative theory of law and a weak version of legal formalism to maintain the autonomy of law. In evaluating Rawls's political and legal liberalism, the following focuses on the idea of public reason and, Rawls claim that judges should rely on public reason in hard cases involving constitutional essentials and matters of basic justice.²⁴⁷

In *Political Liberalism*, Rawls argues that from two basic ideas (the idea of society as a fair system of cooperation and the idea of persons as free and equal) implicit in a democratic political culture, we can specify the conditions (*i.e.*, the original position - including its thick veil of ignorance) for coming to an agreement on a political conception of justice in a democratic society. Rawls claims that this thought experiment establishes this conception of justice as "freestanding" (*i.e.*, "political not metaphysical") in that it does not depend upon a comprehensive doctrine for its justification.²⁴⁸ However, Rawls argues that "an agreement on a political conception of justice is to no effect without a companion agreement on guidelines of public inquiry and rules for assessing evidence."²⁴⁹ Rawls argues that his idea of public reason indicates what these guidelines and rules would entail in a democratic society of free and equal citizens. The "content of public reason" is formulated by a political conception of justice ("political values of public reason") which includes two parts and two values: 1) substantive principles of justice for the basic structure ("the values of political justice"), and 2) "guidelines of inquiry" including "principles of reasoning and rules of evidence in light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them" ("the values of public reason").²⁵⁰

With respect to public reason, Rawls holds out judicial decision making as the ideal type. Rawls maintains that "public reason is the sole reason

246. For a more complete analysis of Rawls' position from which parts of this section are derived, see MARK C. MODAK-TRURAN, *REENCHANTING THE LAW: THE RELIGIOUS DIMENSION OF JUDICIAL DECISION MAKING* 89-135 (unpublished Ph.D. Dissertation, University of Chicago, 2002) (on file with author); see also Mark C. Modak-Truran, *Reenchanting International Law*, 22 MISS. C. L. REV. 263, 279-85 (2003); Mark Modak-Truran, *The Religious Dimension of Judicial Decision Making and The De Facto Disestablishment*, 81 MARQ. L. REV. 255, 266-71 (1998).

247. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 767 (1997) [hereinafter Rawls, *Public Reason Revisited*]. Cf. JOHN RAWLS, *POLITICAL LIBERALISM* 213 (paperback ed. 1996)[hereinafter RAWLS, *POLITICAL LIBERALISM*].

248. *Id.* at 10.

249. *Id.* at 139.

250. *Id.* at 223-24.

the court exercises. It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone."²⁵¹ Judges have "no other reason and no other values than the political."²⁵² Rawls holds out the United States Supreme Court as the "exemplar of public reason" and emphasizes that

[t]he justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to the *political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason.*²⁵³

Thus, when the relevant legal materials are indeterminate, Rawls maintains that judges must rely on the political values of public reason alone. The political values of public reason function like a higher law which provides answers in hard cases and which informs judges' interpretations of prior precedent.

Michael Perry has emphasized, however, that Rawls fails to tell us what a judge may rely on if the political values of public reason (political conception of justice), like the relevant legal materials, are indeterminate.²⁵⁴ Rawls argues that this is rare,²⁵⁵ but Perry has emphasized that "he is simply wrong."²⁵⁶ While Rawls does not say much about this potential legal indeterminacy, he cites Ronald Dworkin's interpretive theory of law approvingly,²⁵⁷ so Dworkin's theory will be used to try to respond to Perry's allegations.

Ronald Dworkin maintains that his interpretative theory of law provides an understanding of law that is quite determinate so that the law provides "right answers" (even in hard cases) based on the criteria of "fit" with prior precedent and "justification" according to the principles of political morality underlying the law.²⁵⁸ With respect to fit, he argues that "in a modern, developed, and complex [legal] system" a tie with respect to fit would be "so rare as to be exotic."²⁵⁹ The principles of political morality can further determine a right answer when the criteria of fit fails so that

251. *Id.* at 235.

252. *Id.*

253. *Id.* at 236 (emphasis added).

254. MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 103 (1997) [hereinafter PERRY, RELIGION IN POLITICS].

255. RAWLS, POLITICAL LIBERALISM, *supra* note 247, at liii.

256. PERRY, RELIGION IN POLITICS, *supra* note 254, at 103.

257. RAWLS, POLITICAL LIBERALISM, *supra* note 247, at 237 n.23.

258. RONALD DWORKIN, LAW'S EMPIRE 225, 255 (1986). Despite much criticism, Dworkin continues to embrace his right answer thesis. See, e.g., RONALD DWORKIN, JUSTICE IN ROBES 41-43 (2006).

259. RONALD DWORKIN, A MATTER OF PRINCIPLE 143 (1985).

“[i]f there is no right answer in a hard case, this must be in virtue of some more problematic type of indeterminacy or incommensurability in moral theory.”²⁶⁰ In the final analysis, Dworkin’s interpretative theory of law constitutes a weak legal formalism which maintains that the law has adequate resources to come to determinate results in all cases.²⁶¹

To the contrary, Habermas claims that Dworkin’s “coherence theory of law can avoid the indeterminacy supposedly due to the contradictory structure of the legal system only at the cost of the theory itself becoming somehow indeterminate.”²⁶² Habermas argues that this indeterminacy results from what has been referred to as the “ripple effect argument.”²⁶³ The ripple effect argument shows that coherency theories require a reconstruction of the system of legal norms in every hard case which results in a continuous reconfiguration of the system of legal norms and amounts to a retroactive interpretation of existing law. Each hard case thus creates a ripple in the coherent system of legal norms and makes the entire system of law indeterminate. Given Dworkin’s failure, the legal liberalism embraced by Dworkin and Rawls fails to maintain the autonomy of law which puts the modern paradigm into question.

Rawls legal liberalism further fails because it depends on a hidden (negative) comprehensive liberal secularism (i.e., a comprehensive denial of comprehensive convictions) that religious judges (i.e., judges recognizing the comprehensive order of reflection) cannot accept and that leads to self-contradiction. Rawls argues that in order for the political values alone to “give a reasonable answer to all, or nearly all, questions involving constitutional essentials and matters of basic justice,” the ordering of values must be made “in light of their structure and features within the political conception itself, and not primarily from how they occur within citizens’ comprehensive doctrines.”²⁶⁴ These political values should not be viewed separately or detached from one another. Rawls stresses that “[t]hey are not puppets manipulated from behind the scenes by comprehensive doctrines.”²⁶⁵

No religious judge, however, could accept this “political not metaphysical” ordering of political values in hard cases. Recall that a comprehensive or religious conviction “purports to identify the necessary and sufficient

260. *Id.* at 144.

261. Brian Leiter similarly describes Dworkin as a “sophisticated formalist . . . who has a rich theory of legal reasoning,” but “still remains within the formalist camp because he sees the law as rationally determinate and he denies that judges have strong discretion (i.e., he denies that their decisions are not bound by authoritative legal standards).” Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1146 (1999) (reviewing ANTHONY SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998)). See also John P. McCormick, *Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises of the State*, 9 YALE J.L. & HUMAN. 297, 324 (1997) (characterizing Dworkin as embracing a “reformed formalism”).

262. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 244, at 219.

263. *Id.* (citing Ken Kress, *Legal Reasoning and Coherence Theories: Dworkin’s Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369 (1984)).

264. Rawls, *Public Reason Revisited*, *supra* note 247, at 777.

265. *Id.*

moral condition or comprehensive condition of all valid moral claims.”²⁶⁶ For a religious judge, an ordering of political values is valid only if it coincides with the ordering dictated by her comprehensive or religious convictions. Yet, Rawls’s political liberalism maintains that the political values of public reason must be ordered exclusively by a “political not metaphysical” conception of justice (freestanding) even in hard cases. In other words, this requires that every judge not embracing Rawls’s liberal secularism to reject the claim that his or her comprehensive conviction is valid or reject that it is the “comprehensive condition of all valid moral claims.” Only those judges who embrace Rawls’s liberal secularism (i.e., comprehensive denial of all comprehensive convictions) could accept Rawls “political not metaphysical” ordering of political values in hard cases.²⁶⁷ As a result, it is not clear how the political values of public reason could be the subject of an overlapping consensus of reasonable comprehensive doctrines that Rawls claims is required for a stable society.²⁶⁸ Either the acceptance of the exclusive political ordering of the political values is a mere *modus vivendi* and inherently unstable, or no consensus is possible and there are a plurality of orderings of the political values informing the law as proposed by the constructive postmodern paradigm.

Moreover, Rawls’s position may finally be incoherent. Rawls has recently admitted that the idea of a well ordered society set forth in *A Theory of Justice* was unrealistic because it required citizens to adopt a “comprehensive liberalism” (which is unrealistic to expect) in order for a just society to be stable.²⁶⁹ In other words, he recognizes that *A Theory of Justice* proposed a “comprehensive liberalism,” but he maintains that *Political Liberalism* only proposes a “political liberalism.” Rawls claims that an objective legitimation of law must be independent of comprehensive doctrines or convictions (i.e., based on the political values of public reason) because comprehensive convictions are nonpublic (i.e., not rational). Contrary to his aspirations, Rawls’s claim entails a comprehensive denial of all comprehensive convictions (a (negative) comprehensive liberal secularism),²⁷⁰ which according to Rawls is not possible, and thus results in an incoherent

266. GAMWELL, *supra* note 112, at 70-71.

267. Franklin Gamwell argues that “[a]t best, in other words, the consensus that Rawls’s political liberalism requires is joined only by those who deny all comprehensive convictions, citizens who believe that principles of justice are independent of any particular answer to the comprehensive question because no comprehensive conviction is valid.” *Id.* at 73. See also Abner S. Greene, *Uncommon Ground—A Review of Political Liberalism and Life’s Dominion*, 62 GEO. WASH. L. REV. 646, 670 (1994)(book review)(“the effect of Rawls’ theory is to favor certain comprehensive doctrines over others without compensation”).

268. In *Political Liberalism*, Rawls makes it clear that he thinks the political conceptions of justice must be supported by an overlapping consensus of reasonable comprehensive doctrines. RAWLS, *POLITICAL LIBERALISM*, *supra* note 247, at 147-48. In other words, after the principles of justice are generated by the original position, they must then be affirmed from within the comprehensive doctrines he refers to as reasonable.

269. RAWLS, *POLITICAL LIBERALISM*, *supra* note 247, at xvii.

270. I refer to Rawls’s comprehensive denial of comprehensive convictions as a (negative) *comprehensive secularism* because its claim that there are no objective (i.e., rational) comprehensive convictions about authentic human existence is comprehensive and negative—a denial of objective religious

account of the modern paradigm. In this respect, Franklin Gamwell argues that “[b]ecause a denial of all religious or comprehensive convictions is itself a (negative) comprehensive claim, it prevents the validation or justification of *any* positive beliefs about human authenticity, comprehensive or otherwise.”²⁷¹ Rawls’s claim then that the political values of public reason must be independent of comprehensive convictions implies a comprehensive denial of comprehensive convictions (i.e., a negative comprehensive conviction) and is self-refuting. Therefore, Rawls’s legal liberalism is incoherent. Its basis for prohibiting judicial reliance on comprehensive convictions in hard cases is itself based on a (negative) comprehensive liberal secularism.

In addition, the failure of Rawls’s theory to generate an overlapping consensus means that Rawls’s comprehensive denial of comprehensive convictions must be established as the official comprehensive conviction. This is required to ensure that in hard cases the political values of public reason are ordered exclusively by a “political not metaphysical” conception of justice (freestanding). Establishing this comprehensive liberal secularism, however, would violate the Establishment Clause and a proper understanding of religious pluralism. The discussion of French republican secularism in Section VI clarifies why this violates the Establishment Clause. The normative requirements of pluralistic inclusivism discussed in Section III. B. also prohibit establishing a religion because this cuts off the pursuit of religious truth which is an ongoing process of reflection. Hence, Rawls’s normative theory of law—legal liberalism—does not maintain the secularization or autonomy of law because it is incoherent, violates the Establishment Clause and religious pluralism, and fails to save the modern paradigm from legal indeterminacy.

C. *Habermas’s Discourse Theory of Law*²⁷²

Unlike Weber and Rawls, Jürgen Habermas’s discourse theory of law attempts to reconcile the modern paradigm and its notion of secularization with legal indeterminacy. He attempts to rely on a normative theory of law

truth. While we might debate what “objectively rational” means, Rawls’s position appears to acknowledge only secular claims can be objectively rational and for this reason is referred to as a type of secularism.

271. GAMWELL, *supra* note 112, at 139. Gamwell further clarifies that “[i]f there is no character or positive principle of human authenticity that is valid under all historical conditions, then all valid understandings of human authenticity must be relative to some or other specific circumstances. But, then, no moral claim could be justified without validating moral relativism, and moral relativism is a *positive* claim about human authenticity, the validity of which cannot be relative to specific circumstances. To assert that the moral norms of every actual and possible human activity are in all respects relative is to make a positive claim about human activity that is comprehensive. In other words, moral relativism is self-refuting because it implies the comprehensive condition that it denies, and therefore, the denial of all comprehensive convictions prevents the validation of any moral claim at all.” *Id.* at 139-40.

272. For a more detailed treatment of Habermas’s adoption and modification of Weber’s social theory and a more detailed summary and critique of Habermas’s discourse theory of law, see Modak-Truran, *Secularization, Legal Indeterminacy, and Habermas*, *supra* note 144, at 84-118, and Modak-Truran, *Habermas’s Discourse Theory of Law*, *supra* note 144, at 464-82.

to maintain the autonomy of law despite legal indeterminacy. The following will briefly summarize the discourses of justification and application before focusing on Habermas's notion of legal paradigms as a source for resolving hard cases.

Relying on and slightly modifying Max Weber's social theory and sociology of law, Habermas argues that the rationalization of society (i.e., secularization) has eliminated religious and metaphysical justifications for law and has differentiated law from politics and morality. Once religious and metaphysical worldviews have been eliminated as a justification for law, law must be legitimated—in a seemingly paradoxical manner—by its legality (i.e., by positive enactment according to certain formal procedures). Habermas concludes that “[t]he democratic procedure for the production of law evidently forms the only postmetaphysical [i.e., postreligious] source of legitimacy.”²⁷³

In the discourse of justification, Habermas argues that “the legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected.”²⁷⁴ Habermas further maintains that the disenchantment of the world eliminated the possibility of an “objective” legitimation of law. Assuming rationality still has some non-subjective meaning, intersubjective agreement must then become the arbiter of legitimation. Thus, the discourse of justification legitimates the law based on the procedures of the discourse principle—intersubjective rational agreement among all those affected after free and full debate.²⁷⁵

At the same time, Habermas is uniquely aware of the importance of maintaining the independence of law from religion, morality, and politics (i.e., a secularized notion of law) despite the threats posed by legal indeterminacy in the application of the law. Habermas maintains that the principle of appropriateness and the discourse of application allow for an impartial application of law that is independent of religious or metaphysical worldviews. The discourse of justification justifies legal norms that are then applied by judges in the discourse of application. At the same time, Habermas claims that almost “all [legal] norms are *inherently* indeterminate,”²⁷⁶ but he contends that the discourse of application does not reopen the question of legitimation and that judges can come to a “‘single right’ decision[]” in every case.²⁷⁷ To determine which valid legal norm is most appropriate in a particular case, Habermas asserts that “one must first

273. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 244, at 448.

274. *Id.* at 104; see also HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 160, at 261-62 (Thomas McCarthy trans., 1984).

275. See HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 244, at 103-04.

276. *Id.* (emphasis in original).

277. *Id.* at 220.

enter a discourse of application to test whether they apply to a given situation (whose details could not have been anticipated in the justification process) or whether, their validity notwithstanding, they must give way to another norm, namely the 'appropriate' one."²⁷⁸ The selection of the "single appropriate norm" for a particular situation is what first confers "the determinate shape of a coherent order on the unordered mass of valid norms."²⁷⁹ The judge is not an interstitial legislator creating new legal norms from extra legal norms. Rather, she searches for the appropriate norm in the system of legal norms and reconstructs that system to make it the best she can in light of her application of the appropriate norm. Habermas's discourse theory of law thus recognizes a complete independence between judicial decision making and judges' personal convictions—whether they are comprehensive, religious, political, or moral.

As noted in Part B, Habermas claims that Dworkin's "coherence theory of law can avoid the indeterminacy supposedly due to the contradictory structure of the legal system only at the cost of the theory itself becoming somehow indeterminate."²⁸⁰ In addition, Dworkin's process of rational reconstruction places unreasonable demands on judges and overtaxes the process of adjudication. Habermas contends that the complexity and uncertainty of this task are reduced by the "*paradigmatic legal understanding* prevailing at the time." Judges can rely on this paradigmatic legal understanding to help determine which principle is appropriate without reconstructing the whole system of legal norms. Habermas embraces Friedrich Kubler's characterization of the legal paradigm as playing a guiding role for judicial decision making: "it determines how the law is understood and construed; it stipulates which places, in which direction, and to what extent statutory law . . . is to be supplemented and modified by doctrinal commentary and judge-made law . . . and this means: it bears part of the responsibility for the future of social existence."²⁸¹

Habermas asserts that there are only three legal paradigms currently in contention to play this guiding role in judicial decision making. Please note that these legal paradigms are not the paradigms of law and religion that I am focusing on. Rather, he identifies the formal liberal paradigm, the materialist social-welfare paradigm, and the proceduralist paradigm. The liberal paradigm envisions society as "tailored for the autonomy of legal subjects who, primarily as market participants, would seek and find their happiness by pursuing their own particular interests as rationally as possible."²⁸² As a reaction to the failures of this formalistic system of negative rights, the social-welfare paradigm proposed a material conception of positive rights that granted individuals entitlements to promote social equality in an unequal society. This introduced "a new category of basic

278. *Id.* at 217.

279. *Id.*

280. *Id.* at 219.

281. *Id.* at 394 (quoting Friedrich Kubler, *Über die praktischen Aufgaben zeitgemäßer Privatrechtstheorie* 51(Karlsruhe 1975)).

282. *Id.* at 401.

rights grounding claims to a more just distribution of social wealth (and a more effective protection from socially produced dangers).”²⁸³

Despite the continued presence of the liberal and social-welfare paradigms, Habermas claims that the current legal paradigm should be understood as proceduralist. This proceduralist paradigm has arisen from the contest between the liberal and social-welfare paradigms and their failure to achieve a proper relationship between private and public autonomy. He further identifies the dispute over legal paradigms as essentially a “political dispute” that should not be decided by the legal elite. Habermas claims that “[t]he paradigmatic preunderstanding of law in general can limit the indeterminacy of theoretically informed decision making and guarantee a sufficient measure of legal certainty only if it is intersubjectively shared by *all* citizens and expresses a self-understanding of the legal community as a whole.”²⁸⁴ Although there seems to be an empirical component to identifying the legal paradigms in contention (facticity), the legal paradigm that is to be shared by all citizens should be validated according to the proceduralist paradigm. Unlike the liberal and social-welfare paradigms, the proceduralist paradigm no longer favors a particular ideal of society, a particular vision of the good life, or even a particular political option. It is formal in the sense that it merely states the necessary conditions under which legal subjects in their role of enfranchised citizens can reach an understanding with one another about what their problems are and how they are to be solved.²⁸⁵ The proceduralist paradigm allows not only for the revision of the conditions it prescribes for subjects to reach understanding but also for the reexamination of the paradigm itself when any perceived change in the social context seems to warrant this. Consequently, Habermas argues that this allows not just legal experts but all participants to participate in determining and continually reevaluating the validity of the legal paradigm for society.

Nevertheless, Habermas’s proceduralist paradigm fails to solve the indeterminacy of law and preserve the secularization or autonomy of law

283. *Id.* at 402-03.

284. *Id.* at 223. Habermas’s argument here seems very similar to the German school of historical jurisprudence, which “considered law to be an integral part of the common consciousness of the nation, organically connected with the mind and the spirit of the people [*i.e.*, *Volksggeist*].” HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 299 (1993). Harold Berman notes that Friedrich Karl von Savigny’s

historical school emphasized the ultimate source of law in the older Germanic (*germanische*) tradition of popular participation in lawmaking and adjudication as well as the more modern German (*deutsche*) tradition of professional scholarly interpretation and systematization of the *jus commune*, the common law, which had been developed over the centuries out of the texts of the Roman law of Justinian and the canon law of the Church. . . . the German *jus commune* was supposed to reflect the common consciousness of the German nation, as it has developed over time.

Id. at 300. More specifically, Berman links Habermas to the German school of historical jurisprudence by noting that, in October 1986, Habermas justified the abolition of capital punishment in Germany by stating that “after what Germany lived through under Nazism, it would have been impossible to restore capital punishment.” *Id.* at 301.

285. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 244, at 445.

under the modern paradigm of law and religion. As noted above, Habermas claims both that almost all legal norms are indeterminate and that the discourse of application itself is indeterminate because of the continual reconstruction of legal norms into a coherent system in their application. His solution was to offer the notion of a legal paradigm. This notion presents several problems that undermine the impartiality and validity of the discourse of application and puts into question his discourse theory of law and the modern paradigm of law and religion.

The first problem concerns choosing among the contending legal paradigms. Habermas notes that there is a contest among the liberal, social welfare, and proceduralist paradigms that must be resolved.²⁸⁶ Habermas contends that the legal paradigm can limit indeterminacy and “guarantee a sufficient measure of legal certainty only if it is intersubjectively shared by *all* citizens and expresses a self-understanding of the legal community as a whole.”²⁸⁷ To achieve this shared legal paradigm, he claims that the proceduralist paradigm would allow this decision to be made in a democratic way, like the process of justification.²⁸⁸ Rather than judges deciding what the legal paradigm should be, all affected could agree on a legal paradigm under ideal speech conditions, like in the discourse of justification. This would only solve the indeterminacy problem, however, if the discourse of justification can provide a coherent, rational justification of the law that supports the autonomy of the law. In a prior article, I pointed out many reasons—including self-contradiction like Rawls—why Habermas’s discourse of justification fails to justify the procedural requirements of the discourse of justification and the autonomy of the law.²⁸⁹

Even assuming that the discourse of justification succeeds in providing a coherent, rational justification of the law, legal paradigms may fail to solve the indeterminacy problem because they are indeterminate. Habermas notes that legal norms are not self-interpreting and that, except

286. *Id.* at 437-38.

287. *Id.* at 223.

288. *Id.* at 443-46.

289. In addition, Habermas maintains that “the universalization principle acts like a knife that makes razor-sharp cuts between evaluative statements and strictly normative ones, between the good and the just.” JURGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 104 (Christian Lenhardt & Shierry Weber Nichol森 trans., 1990) [hereinafter HABERMAS, *MORAL CONSCIOUSNESS*]. In order for a law to be impartial (i.e., not violate moral norms), Habermas’s posmetaphysical, rational justification of law appears to depend upon the possibility of these razor-sharp cuts. Otherwise, the ethical-political and pragmatic reasons would result in a consensus based on strategic or prudential rationality like Hobbes. In that case, the consensus signals not a notion of intersubjective rational validity but a confluence of subjective interests. However, it is unclear how Habermas can justify his distinction between ethical-political and pragmatic reasons and moral reasons because this is itself a claim about the good. “To assert that all good human purposes are in all respects historically specific is itself a universal evaluation of human purposes In other words, the assertion is self-refuting.” Franklin I. Gamwell, *Metaphysics and the Rationalization of Society*, 23 *PROCESS STUDIES* 219, 230 (1994). As a result, Habermas’s discourse theory of law fails to provide an impartial or rational justification for law that supports legal autonomy. For a more detailed critique of Habermas’s discourse of justification, see Modak-Truran, *Habermas’s Discourse Theory of Law*, *supra* note 144, at 477-81.

for certain application-specific legal rules, all legal norms are indeterminate.²⁹⁰ Given that the legal paradigm is a norm, Habermas must indicate how it differs from other legal norms so that its indeterminacy does not lead to an infinite regression. The liberal, social welfare, and proceduralist legal paradigms offered by Habermas belie interpretation as application-specific rules. Alexy characterizes them as “highly abstract” and claims that “they are not sufficient for determining a definite decision,” but “can at most substantiate prima facie priorities between principles.”²⁹¹ Given this abstraction, legal paradigms cannot do the work Habermas prescribes for them, because they themselves are indeterminate.

Under these circumstances, judges would have to draw on extralegal norms to decide hard cases. Elsewhere, I have argued that this means that judges must rely on comprehensive or religious convictions to validate these extralegal norms.²⁹² Whether or not this is the case, Habermas claims that relying on extralegal norms would undermine the rational and impartial basis of judicial decisionmaking. It would shift the justification of norms from the discourse of justification to the discourse of application. As with legal hermeneutics, this would allow judges to rely on ethical and historically relative legal norms rather than discursively justified or impartially rational ones. Thus, if legal paradigms are indeterminate, Habermas’s discourse of application fails to maintain the secularization or autonomy of law required by the modern paradigm of law and religion.

Finally, even if legal paradigms are determinate, this raises the issue concerning how to define the nature and scope of legal paradigms. Habermas claims that “[a] paradigm is discerned primarily in important court decisions and usually equated with the *judge’s* implicit image of society.”²⁹³ Expressions like “social ideal,” “social model,” and “social vision” have also become accepted ways of referring to a social epoch’s legal paradigm.²⁹⁴ He observes that “[s]uch expressions refer to those implicit ideas or images of one’s own society that provide a perspective for the practices of making and applying law.”²⁹⁵ Following Henry J. Steiner’s account of judicial social visions, Habermas recognizes that this implicit image of society entails the judge’s understanding of all of society. It includes the judge’s images of “socioeconomic structure, patterns of social interaction, moral goals, and political ideologies.”²⁹⁶ It also includes a judge’s beliefs

290. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 244, at 217.

291. Robert Alexy, *Jürgen Habermas’s Theory of Legal Discourse*, 17 *CARDOZO L. REV.* 1027, 1032 (1996).

292. Modak-Truran, *Reenchanting the Law*, *supra* note 9 (arguing that the indeterminacy of the United States’ law requires judges to rely on religious or comprehensive convictions to justify their deliberation about hard cases fully, even though they can only provide a partial justification of their decisions in their written opinions in terms of noncomprehensive legal norms because of the Establishment Clause of the First Amendment).

293. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 244, at 392.

294. *Id.*

295. *Id.*

296. *Id.* (quoting HENRY J. STEINER, *MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS* 92 (1987)).

about social actors such as “their character, behavior, and capacities” and her beliefs about things like accidents, including “their causes, volume[,] and toll.”²⁹⁷

The scope of this social vision is very broad and includes not only descriptive components (empirical claims about the current conditions of society) but also normative components (normative claims about how society should be organized and how citizens should conduct themselves). Habermas even claims that legal paradigms have a “world-disclosive function” in that they “open up interpretive perspectives from which the principles of the constitutional state (in a specific interpretation) can be related to the social context as a whole.”²⁹⁸ Moreover, he argues that the legal paradigm “expresses a self-understanding of the legal community as a whole.”²⁹⁹

With this broad scope, it is hard to distinguish social visions or legal paradigms from comprehensive or religious convictions about authentic human existence. If legal paradigms cannot be distinguished from religious or comprehensive convictions, Habermas’s discourse of application would strangely be requiring judges to rely on something like comprehensive convictions in their decisionmaking. By requiring judges to rely on an official legal paradigm or “self-understanding of the legal community,” Habermas’s discourse theory of law would in effect require establishing a comprehensive conviction in violation of the Establishment Clause of the First Amendment. In addition, this would undermine Habermas’s whole attempt to provide an intersubjectively rational justification of law and violate his normative understanding of secularization. Recall that Habermas’s normative account of secularization requires that the justification and application of law must be sealed off from comprehensive and religious convictions in order to be rational. According to Habermas, comprehensive and religious convictions are not rational, because they cannot be intersubjectively validated.

If solving the indeterminacy problem in the discourse of application requires judges to rely on comprehensive or religious convictions, Habermas would be solving the indeterminacy problem at the expense of making judicial decisionmaking, on his account, nonrational. Like legal hermeneutics, the discourse theory of law would be proposing that judges decide hard cases based on something that is ethical and historical rather than moral and impartial. Unless legal paradigms can be distinguished from comprehensive convictions, the discourse of application cannot be rationally validated, and the normative “secularization of law” would paradoxically require establishing the legal paradigm as the comprehensive or religious norm for resolving hard cases. Habermas’s discourse of application would then fail to seal off judicial decisionmaking from religious or comprehensive convictions that would undermine his core descriptive and

297. *Id.*

298. *Id.* at 437.

299. *Id.* at 223.

normative claims about the secularization of law required to preserve the modern paradigm of law and religion.

Even if legal paradigms can be distinguished from comprehensive convictions, Habermas's discourse theory of law is incoherent and requires an establishment of a comprehensive or religious conviction. Habermas's discourse theory of justification and application rely on his claim that *all* comprehensive convictions are not rational and cannot be intersubjectively validated. This claim constitutes a comprehensive denial of all comprehensive convictions³⁰⁰—a hidden (negative) comprehensive liberal secularism. However, this claim is self-contradictory because it presupposes what it denies—the possibility of rational comprehensive evaluation. In addition, those with differing comprehensive convictions would reject this comprehensive evaluation and the discourse theory of law. The discourse theory of law would not be supported by an intersubjective agreement. In order for the discourse theory of law to gain acceptance, this comprehensive evaluation would have to be established as part of the law. This would result in a violation of the Establishment Clause (see Part VI. B. below), and the discourse theory of law would fail to provide for the justification and application of law independent of any particular comprehensive conviction.

Despite his substantial efforts, legal paradigms fail to maintain the secularization of the law either because they are indeterminate (allow reliance on religious or comprehensive convictions) or because they are determinate (require reliance on a nonrational comprehensive conviction which makes the discourse theory incoherent and requires an establishment of religion). Habermas's normative theory of law—the discourse theory of law—fails to preserve the independence of law from religion in the face of legal indeterminacy. This suggests that the simultaneous endorsement of these two assertions in contemporary legal theory under the modern paradigm is misguided and that a new paradigm for law and religion is needed. Consequently, Parts B and C have shown that giving up on the strong legal formalism posited by Weber requires forfeiting the secularization of the law (both descriptively and normatively) in ways not yet fathomed by contemporary legal theory.

VI. SECULARISM AND ITS DISCONTENTS

French republican secularism shows more concretely the problematic consequences that arise when comprehensive convictions—including the liberal secularism presupposed by Rawls and Habermas—are embraced by the state. Section VI will provide an overview of the French headscarf controversy as vehicle for demonstrating the parallels between the French republican secularism and the liberal secularism of Rawls and Habermas. The secularism that is implicit with Rawls and Habermas becomes explicit in the French headscarf crisis. This helps make it clear that secularism—

300. Gamwell, *Metaphysics and the Rationalization of Society*, *supra* note 289, at 230.

whether the negative liberal form or the positive republican form—competes with traditional religions like Islam for identifying authentic human existence. The competition between traditional religion and secularism further supports defining religion broadly to include secularism and other so-called secular notions of authentic human existence. Moreover, both these types of secularism fail to maintain the separation of law and religion required by the modern paradigm and require establishing secularism as a state religion contrary to a proper understanding of religious pluralism and the Establishment Clause.³⁰¹

A. French Republican Secularism and Muslim Headscarves

In March 2004, the French National Assembly passed a law prohibiting children from wearing clothing or insignia that “conspicuously manifest a religious affiliation.”³⁰² The law was based on two commissions—one formed by the French Parliament and the Stasi Commission which was appointed by President Jacques Chirac. These “two commissions voted with near-unanimity for the law” that was then adopted by a large majority of the French National Assembly and went into effect in September 2004.³⁰³

This ban on religious symbols in public schools was based on Article 2 of the French Constitution, which provides that “France is a republic, indivisible, *secular*, democratic and social.”³⁰⁴ The term “secular” in article 2 is the usual English translation for the French term *laïcité*. Despite this usual translation, Jeremy Gunn notes that “*laïcité* is used in France to summarize prevailing beliefs regarding the proper relationship between religion and the French state,” but emphasizes that *laïcité* “is difficult to define and almost impossible to translate.”³⁰⁵ For instance, he notes that the Stasi Report stated that *laïcité* “rests on three interconnected values: ‘liberty of conscience, equality of rights in spiritual and religious choices, and neutrality of political power.’”³⁰⁶ Part A does not attempt to definitively sort out the complicated French notion of *laïcité* or secularism. Rather, the focus will be to see how *laïcité* competes with religions like Islam to shape the identity of French citizens and resident aliens.

Social anthropologist John Bowen indicates that the public debate made it clear that the ban on wearing religious symbols in public schools was “aimed at keeping Muslim girls from wearing headscarves in [public] schools.”³⁰⁷ Bowen engaged in an “anthropology of public reasoning” to

301. The normative aspects of religious pluralism prohibiting the state from cutting off the ongoing process of pursuing religious truth will be discussed in more detail in *Beyond Theocracy and Secularism (Part II)* along with a more detailed treatment of the normative implications of religious pluralism for a constructive postmodern paradigm of law and religion.

302. Law No. 2004-228 of Mar. 15, 2004, J.O., Mar. 17, 2004, at 5190.

303. JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE AND PUBLIC SPACE 1 (2007).

304. ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD 84 (1995)(emphasis added).

305. T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420, 420 n.2.

306. *Id.* at 466.

307. BOWEN, *supra* note 303, at 1.

try to discern the significance of the debate about headscarves in France. He approached this issue by asking “how French public figures understand the proper relationships among religion, the state, and the individual, and how they justify their arguments and policies in terms of concepts such as laïcité, Republicanism, and equality.”³⁰⁸ From his analysis, he discovered that the headscarf issue was consistently linked to “three other social problems: communalism, Islamism, and sexism” by public officials, journalists, and intellectuals.³⁰⁹ All three of these issues relate to the failure of Muslim immigrants to fulfill the French republican expectations of integrating into French culture and adopting “French” republican values.

For instance, Bowen defines “communalism (*communautarisme*)” as “the closing of ethnically defined communities on themselves . . . and the refusal of integration.”³¹⁰ He notes a parallel between the “Jacobin” impulse after the 1789 Revolution to attack guilds and religious orders as impeding common values and the contemporary criticism of Muslim groups.³¹¹ Muslim groups are likewise criticized for constraining Muslims “both by requiring them to follow certain rules (requiring girls to wear scarves) and by keeping them from participating in emancipation through immersion in state institutions, and that they follow a different authority than that of the French state.”³¹² Similarly, the ambiguous term “Islamism (*islamisme*)” “is used to refer to movements that advocate creating Islamic states as well as to those that merely promote public manifestations of Islam.”³¹³ Finally, Bowen found that headscarves were linked to claims that poor Muslims posed a danger to the equality of women because they held misogynist attitudes and physically abused women.

Bowen found another revealing pattern in French explanations of laïcité. His interviews and conversations revealed that the French held a collective narrative of French citizenship.³¹⁴ This narrative helps explain the republican character of French secularism. The French narrative emphasizes a “Republican polis” going back to the Greeks which holds that the key function of the state is to facilitate virtue and the good life.³¹⁵ Like other forms of republican political thought, French secularism has “insisted

308. *Id.* at 3.

309. *Id.* at 155.

310. *Id.* at 156.

311. *Id.* at 160.

312. *Id.*

313. *Id.*

314. *Id.* at 19.

315. BOWEN, *supra* note 303, at 15-16. Under republican notions of the state, the state functions to help citizens to perfect their virtue and pursue the common good rather than the minimalist liberal notion that the state functions primarily as a mechanism to resolve conflicting individual pursuits of the good. See Lawrence B. Solum, *Virtues and Voices*, 66 CHI.-KENT L. REV. 111, 114-22 (1990) (emphasizing Aristotelian roots of the revival of republicanism and the notion of civic virtue). See also Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329 (1994). In this respect, Aristotle maintains that “[p]olitical society exists for the sake of noble actions, and not of living together.” ARISTOTLE, *THE POLITICS*, 1281a:2-3 (B. Jowett trans.), in 2 *THE COMPLETE WORKS OF ARISTOTLE* (Jonathan Barnes ed., rev. Oxford trans. 1984). The good of the individual is not a private affair but the public life of a

on the primacy of the political domain as the space where citizens experienced their common values and interests."³¹⁶ French secularism further emphasizes the republican "idea that one finds both liberty and order only through the intervention of the state."³¹⁷ Moreover, French secularism roughly follows the republican philosophy of Jean-Jacques Rousseau—"living together in a society requires agreement on basic values" and "requires the state to construct institutions and policies designed to integrate newborns and newcomers into French society by teaching them certain ways of acting and thinking."³¹⁸

Bowen further indicates that the narrative turns rather quickly to a genealogy of the wars of religion following the Reformation discussed in Section II above. One public official emphasized that: "In French history, we came out of the religious wars, both Catholics against Protestants and then the Catholic Church against secularists, and then we developed the system of *laïcité*. This limits the freedom of *culte* so as to prevent the reemergence of wars."³¹⁹ The lesson from history, according to Bowen, is that the French have come to embrace a "strong distinction between the public practice of organized religion and the private activities characteristic of one's personal religious beliefs."³²⁰ The discussion in Section II regarding the shift from the pre-modern paradigm to the modern paradigm because of the wars of religion and the goal of privatizing religion seem to be well rehearsed by the French.

Without more, the French notions of *laïcité*, republicanism, and equality could be interpreted as mere political aspirations that the French value more than religious liberty. From the Muslim perspective, however, these notions and the genealogy that explains them appear to be much more than then just politics. Rather, they go to the heart of French and European identity. The French narrative only includes those who are, for the most part, ethnically French and Christian or post-Christian. In an essay entitled *Muslims as a "Religious Minority" in Europe*, anthropologist Talal Asad, who is Muslim, emphasizes that "to the extent that 'France' embodies the Jacobin narrative, it *essentially* represents the Christian and post-Christian citizens who are constituted by it."³²¹ He further claims that "[t]he problem of understanding Islam in Europe is primarily . . . a matter of understanding how 'Europe' is conceptualized by Europeans. Europe (and the nation-states of which it is constituted) is ideologically constructed in such a way that Muslim immigrants cannot be satisfactorily represented in it."³²²

citizen is necessary for the individual's attainment of the highest good. For further discussion of Aristotle's republican political and legal theory, see Mark C. Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 YALE J.L. & HUMAN. 249, 263-67 (2000).

316. *Id.* at 160.

317. *Id.* at 19.

318. *Id.* at 11.

319. BOWEN, *supra* note 303, at 17.

320. *Id.* at 19.

321. TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 175 (2003).

322. *Id.* at 159.

Asad emphasizes that Europeans believe that “real Europeans acquire their individual identities from the character of their civilization,” so that inhabitants “[w]ithout that civilizational essence” are not “‘really’ or ‘fully’ European.”³²³ He also argues that Muslims are often “misrepresented in the media and discriminated against by non-Muslims.”³²⁴ The exclusion of Muslims helps clarify that the European identity derives from “key influences on European experience” including “the Roman Empire, Christianity, the Enlightenment, and industrialization.”³²⁵ Asad’s argument reverses the charge from Muslim resistance to integration (communalism) to European (and particularly French) exclusion of Muslims and obliteration of Muslim cultural influences on the history and experience of Europe.³²⁶

In addressing the French headscarf issue, Asad argues that “the French secular state today abides in a sense by the *curius region eius religio* principle (the religion of the ruler is the religion of his subjects), even though it disclaims any religious allegiance and governs a largely irreligious society.”³²⁷ Although not specifically identifying French secularism as a religion, Asad’s comments suggest that French secularism is the “religion of the ruler” that the French government imposes on its citizens to promote social stability. Asad emphasizes that the Muslim headscarf symbolizes the perceived Islamic threat to “the secular character of the [French] Republic.”³²⁸ Ironically, the French treatment of headscarves, although different in degree, harkens back to the 16th century post-Reformation persecution in Denmark, Sweden, Norway, France and England of Christian groups not following the ruler’s chosen form of Christianity. Recall Harold Berman’s observation that in France, “[r]epression of Calvinism burst into civil war in 1562, and over the next thirty-six years a total of eight successive civil wars, known collectively as the Wars of Religion, were fought by royal Roman Catholic forces to put down the urban Huguenot uprisings.”³²⁹

The French government seems to have missed the chief lessons learned from the wars of religion. Coercing uniformity of belief and practice under the pre-modern paradigm arguably triggered and certainly fueled the wars of religion. The solution—embodied in the Peace of Westphalia (1648) at the end of the Thirty Years War—required ruler’s to protect religious liberty and forego imposing the religion of the ruler on those of other confessions of faith. Peace and a stable social order required tolerance and respect for confessional differences not imposing a common confession of faith.

323. *Id.* at 168.

324. *Id.*

325. *Id.* at 166.

326. For example, Asad notes that “[i]t is estimated that more than half the inhabitants of French prisons are young Muslims of North African origin.” Talal Asad, *French Secularism and the “Islamic Veil Affair,”* 8 HEDGEHOG REV. 93, 94 n. 3 (2006) (citing *Jerusalem Report* (6 May 2002))[hereinafter Asad, *French Secularism*].

327. *Id.* at 94.

328. *Id.*

329. BERMAN, LAW AND REVOLUTION II, *supra* note 31, at 58-59.

Despite these well-known lessons, the French prohibition of religious symbols in public schools parallels these prior pre-modern enforcements of religious uniformity. Asad emphasizes that many Muslim wearing headscarves in public believe it is a religious duty. They wear the veil but not because Shariá law requires it. France has not adopted Shariá law. Rather, they wear it as an “act of piety” based on their conscience. Contrary to the French government’s public/private distinction, Asad emphasizes that “the veil becomes for that reason an integral part of herself. For her it is not a *sign* intended to communicate something but *part of an orientation, of a way of being*.”³³⁰ In other words, it makes no sense to tell Muslim school girls that they can wear headscarves at home but not at school. It is part of how they define themselves in public life as followers of Islam. The French government, however, attempts to redefine for these girls what is required by Muslim piety, or instead, to impose a French secular identity on them.

These comments should make apparent why French secularism constitutes a comprehensive or religious conviction about authentic human existence. Recall that Ogden’s definition of religion discussed in Section III above challenged the conventional distinction between what is “secular” and what is “religion”. Ogden maintains that any explicit comprehensive conviction about human authenticity is a religion. Religion not only includes the recognized world religions of Christianity, Judaism, Islam, Hinduism, and Buddhism, but it also includes humanism, capitalism (when proposed as a normative rather than as a positive theory), communism, and other so-called secular answers to the existential or comprehensive question. In this respect, French secularism constitutes a comprehensive or religious conviction about authentic human existence because it defines how citizens ought to live and dress in the public realm and specifies common values and interests for French citizens. In addition, French secularism views traditional religion as its main competition and prescribes comprehensive demands on French citizens that conflict with traditional religious practices.

Like religious traditions, French secularism also provides a historical narrative explaining the transition from a primarily Roman Catholic French identity to a secular or post-Christian French identity. For instance, the genealogy of French citizenship emphasizes the way French secularism was “necessary” to overcome the wars of religion between the Protestants and Catholics and between Catholics and secularists. During the 1789 Revolution, French secularism even trumped religious groups which were abolished by the French legislature along with guilds as an impediment to facilitating common French values and interests.³³¹ The centrality of this historical narrative to French secularism resembles traditional religious narratives like the Exodus, which marks the liberation of Jews from slavery under the pharaohs in Egypt.³³² This is not to say that nations can’t foster

330. Asad, *French Secularism*, *supra* note 326, at 96.

331. *Id.* at 160.

332. *See generally*, *Exodus* 1:1-15:27 (The Jerusalem Bible: Reader’s Edition (1966)).

genealogies of their origin. French secularism goes farther by requiring that its genealogy trump or supersede religious narratives and religious identities that pose little or no threat to the social order. All French citizens must embrace the genealogy of French secularism and recognize its comprehensive priority over private or personal genealogies including religious ones. For example, in the contemporary context, French secularism competes with Islam for ultimate loyalty and requires prohibiting voluntary acts of religious piety—like wearing headscarves—which seem to pose little or no threat to the stability of the social order. Giving up headscarves symbolizes the much deeper sacrifice of surrendering religious conceptions about authentic human existence that is required to become properly “French” and “European.”

Although less thorough-going, the liberal secularisms of Rawls and Habermas make similar comprehensive demands. Even though religious convictions are the comprehensive condition of validity, Rawls requires sacrificing these religious justifications for “political” values as the sole justification of the law. Like French secularism and other religious traditions, Rawls provides a historical narrative that claims that “[m]oral philosophy was always the exercise of free, disciplined reason alone. It was not based on religion, much less on revelation, as civic religion was neither a guide nor a rival to it.”³³³ Contrary to classical Greek political philosophy, he blames Medieval Christianity for inappropriately basing politics on religion rather than on reason (i.e., in my terms the pre-modern paradigm). Rawls emphasizes that the reformers also adopted the pre-modern paradigm—“Luther and Calvin were as dogmatic and intolerant as the Roman Church had been”—which led to the wars of religion among “rival authoritative and salvationist religion[s].”³³⁴ To return to rational politics, the narrative concludes that citizens must rely on political values because all comprehensive convictions are not rational.

Habermas similarly maintains the independence of law from religion despite the threats posed by legal indeterminacy in the application of the law. In hard cases, Habermas requires judges to rely solely on legal paradigms—that appear suspiciously similar to comprehensive or religious convictions—as the basis for their decisions rather than personal moral, political, or religious beliefs. According to Habermas, comprehensive and

333. RAWLS, *POLITICAL LIBERALISM*, *supra* note 247, at xxiv. With respect to political liberalism, Alasdair MacIntyre helpfully observes that

The starting points of liberal theorizing are never neutral as between conceptions of human good; they are always liberal starting points. And the inconclusiveness of the debates within liberalism as to the fundamental principles of liberal justice (see *After Virtue*, chapter 17) reinforces the view that liberal theory is best understood, not at all as an attempt to find a rationality independent of tradition, but as itself the articulation of an historically developed and developing set of social institution and forms of activity, that is, as the voice of a tradition. Like other traditions, liberalism has internal to its own standards of rational justification. Like other traditions, liberalism has its set of authoritative texts and its disputes over their interpretation. Like other traditions, liberalism expresses itself socially through a particular kind of hierarchy.

ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 345 (1988).

334. RAWLS, *POLITICAL LIBERALISM*, *supra* note 247, at xxv.

religious convictions are not rational because they cannot be intersubjectively validated. Both Rawls and Habermas require citizens and public officials to give up their comprehensive convictions as the comprehensive condition of validity and to accept a (negative) comprehensive liberal secularism (i.e., a comprehensive denial of comprehensive convictions). Only those already subscribing to a (negative) comprehensive liberal secularism like Rawls and Habermas will find this position “neutral” among religious convictions as required by the modern paradigm. All others will understand that Rawls and Habermas are advocating that the state should impose comprehensive liberal secularism on them whether they agree with it or not.

All three forms of secularism also maintain a unitary legitimation for the law based on a particular understanding of secularism and require the state to enforce compliance with and allegiance to that secularism. The modern paradigm has been interpreted to require not only that law remain autonomous from religion but also that the law must be legitimated by a unitary secular foundation. The price of secularity for Rawls, Habermas, and French secularism includes rejecting your religious convictions—the comprehensive condition of normative validity—as not rational so that everyone can accept the same “rational” foundation for the law. French secularism made it clear that enforcing a unitary secular basis for the law may further require sacrificing religious practices that pose little or no threat to the social order. Moreover, these proposals for a unitary secular foundation all attempted to replace traditional religious convictions with secular comprehensive convictions under the illusion of neutrality.

B. *Tensions Between Secularism and the Modern Paradigm*

The attempt to replace religion with a unitary secular foundation presents two significant problems for the modern paradigm. First, the unitary secular foundation constitutes a continuation of the pre-modern religious justification of law by other means. Contrary to the modern paradigm’s autonomy of law and religion, these comprehensive “secular” foundations for law could be characterized—in Pierre Schlag’s terms—as a “*Continuation of God by Other Means*.”³³⁵ Schlag argues that there is “a certain form of reasoning very popular in American jurisprudence” which bears “an uncanny and disturbing similarity to various proofs of God,” such as “*the cosmological proof, the argument from design, and the ontological proof*.”³³⁶ He concludes that “despite its secular pretensions, legal thought is in part a kind of theological activity.”³³⁷ Similarly, Anthony

335. Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 CAL. L. REV. 427, 427 (1997).

336. *Id.* at 427-28 (emphasis in original).

337. *Id.* at 428.

Carty maintains that postmodern thought has shown that the modern conception of law has failed on its own terms because it “incorporated fundamentally religious/metaphysical assumptions into its own categories of thought.”³³⁸

While not actually identifying the comprehensive or religious nature of liberal and republican secularism, the postmodern critique helps identify that the unitary “secular” foundation of the modern paradigm arguably continues the theocratic tendencies of the pre-modern paradigm in a slightly different form. Rather than avoiding the divisiveness of traditional religious beliefs, these versions of secularism just chose a different comprehensive conviction to legitimate the state. They did not provide a neutral justification for the state but rather chose different gods to worship. This is clearly seen by the competition in France between French secularism and Islam. The religious practice of wearing headscarves posed no real threat to the health, safety, or welfare of France. Yet, the French felt compelled to coerce Muslim school girls to reject their religious duty to wear headscarves and to affirm their liberated “secular” identity as bareheaded French girls. The main public policy reason to enforce this secular orthodoxy seems to be the preservation of the religion of the ruler—the post-Christian French majority. The French government is the guardian of the law’s “secular” foundation in the same way that rulers under the pre-modern paradigm were guardians of the religious foundations of their territories. Thus, to the extent these unitary secular foundations define authentic human existence, they are comprehensive or religious convictions, and the modern paradigm constitutes a continuation rather than a break with the pre-modern paradigm.

The second significant problem for the modern paradigm in the United States stems from the Establishment Clause violations resulting from the adoption of either the liberal or republican forms of secularism. The Establishment Clause represents the most fundamental separation of law and religion for the modern paradigm. If these versions of secularism violate the Establishment Clause, this would further suggest the need for a new paradigm of law and religion.

There is substantial disagreement among the Supreme Court Justices about the parameters of the Establishment Clause. Scholars have often identified three main positions taken by the Justices—strict separation, neutrality, and accommodation—in their interpretations of the Establishment Clause.³³⁹ These theoretical positions appear to influence the Justices’ decisions quite substantially. For instance, even when the Justices all

338. Carty, *supra* note 211, at 2. Harold Berman similarly argues that “Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted”. BERMAN, *LAW AND REVOLUTION I*, *supra* note 31, at 165.

339. See, e.g., THE FIRST AMENDMENT: A READER 444-84 (John H. Garvey & Frederick Schauer eds., 2d ed. 1996) (dividing articles on the modern theories of the Establishment Clause into three main groups: Strict Separation, Neutrality, and Accommodation); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1192-99 (3rd ed. 2006) (stating that there are “three major competing approaches” to the Establishment Clause).

apply the endorsement test, they apply the test differently and reach vastly different results.³⁴⁰

Despite this disagreement, there has been long-standing agreement among the Justices as to the most basic parameters of the Establishment Clause. In the first case applying the Establishment Clause to a state statute, the Court articulated a strict separation position in stating that “[t]he ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”³⁴¹ More recently, Justice Kennedy, who advocates substantial accommodation of religion by the state, has declared that “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”³⁴² At the very least, the Establishment Clause appears to prohibit the state from explicitly embracing a particular religious justification for the law.³⁴³ This prohibits judges and legislators from articulating religious justifications in legal opinions or in statutory requirements. By setting forth religious convictions in this manner, judges and legislators would effectively establish those religious convictions as an official religious justification for the law. Assuming that the secularism of Rawls and Habermas and French secularism constitute religious convictions, even this minimal understanding of the Establishment Clause would prohibit the state from embracing and mandating compliance with any of these forms of secularism.

340. See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000). In *Mitchell*, the central issue was whether the Federal government program for lending educational materials and equipment to public and private schools (including parochial schools) violated the Establishment Clause. *Id.* at 801. The plurality opinion by Justice Thomas (joined by Rehnquist, Scalia, and Kennedy) took an Accommodation position and held that the lending of educational materials and equipment to parochial schools does not violate the Establishment Clause even if some of those materials are used for religious indoctrination. *Id.* at 809-10. By contrast, the concurring opinion by Justice O'Connor (joined by Breyer) took a Neutrality position and argued that lending educational materials and equipment to parochial schools was constitutional because there were reasonable safeguards to prevent diversion of materials for religious indoctrination and there was only evidence of *de minimis* diversion of materials for religious indoctrination. *Id.* at 857-67. Finally, the dissenting opinion by Justice Souter (joined by Stevens and Ginsburg) took a Strict Separation position and argued that the lending of educational materials and equipment to parochial schools violated the Establishment Clause because of evidence of some actual diversion and a risk of future diversion of these materials for religious indoctrination. *Id.* at 902-10.

341. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (applying the Establishment Clause of the First Amendment to a New Jersey law authorizing local school boards to repay parents for the cost of their children's bus transportation to private schools).

342. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. at 678). In this respect, Michael Perry argues that the essence of “the free exercise and nonestablishment norms is that government may not make judgments about the value or disvalue—the true value, the moral value, the social value, any kind of value—of religions or religious practices or religious (theological) tenets.” PERRY, RELIGION IN POLITICS, *supra* note 254, at 9. At the very minimum, he contends that the nonestablishment norm means that the government may not take action favoring one or more religions as such (in effect discriminating against others). By writing religious convictions into the law, the state appears to be endorsing a religious conviction as true or favoring one religion over others. *Id.* at 14-16.

343. For a more extensive analysis of the Establishment Clause and religious convictions in government decision making, see Modak-Truran, *Reenchanting the Law*, *supra* note 9, at 765-774, 781-86.

The Court has recognized some minor exceptions to this general prohibition on the state endorsement of specific religious convictions including the “statutorily prescribed national motto ‘In God We Trust,’” and the “compensation of the Chaplains of the Senate and the House and the military services.”³⁴⁴ Former Chief Justice Burger refers to these accommodations of religion as “the Government’s acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage.”³⁴⁵ However, none of these exceptions permit explicit reliance on religious convictions as a justification for the law. These exceptions deal with historic or symbolic recognitions of religion but do not rely on religion as a justification for government decision making.

Both under the *Lemon* test and the endorsement test, the Supreme Court has interpreted the Establishment Clause to require that laws have a secular purpose and a primarily secular effect. Under *Lemon v. Kurtzman*,³⁴⁶ the Supreme Court specified three tests (collectively referred to as the *Lemon* test) that all must be met for a statute to pass an Establishment Clause challenge: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [and] finally, the statute must not foster ‘an excessive government entanglement with religion.’”³⁴⁷ Although the Court has not formally repudiated the *Lemon* test, “[a] majority of the justices sitting in 2003 have criticized it, and it has not been relied on by a majority to invalidate any practice since 1985.”³⁴⁸ For instance, both Chief Justice Rehnquist and Justice Scalia have advocated abandoning the *Lemon* test and, in particular, have severely criticized the secular purpose prong.³⁴⁹

In place of the *Lemon* test, many of the Justices have embraced the “endorsement test,” which was originally proposed by Justice O’Connor in

344. *Lynch*, 465 U.S. at 676.

345. *Id.* at 677.

346. 403 U.S. 602 (1971).

347. *Id.* at 612-13.

348. GEOFFREY R. STONE, ET AL., *THE FIRST AMENDMENT* (3rd ed. 2008).

349. See *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting) (criticizing the *Lemon* test and arguing that “[t]he secular purpose prong has proven mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate”). In his dissenting opinion in *Edwards v. Aguillard*, Justice Scalia contended that the secular purpose prong should be abandoned and argued that “discerning the subjective motivation of those enacting the statute is to be honest, almost always an impossible task.” *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). Scalia further maintained that there was “relatively little information upon which to judge the motives of those who supported the Act,” and that it was not clear what source of the legislators intent should be controlling. *Id.* at 619, 637-38. He also declared that it is not clear “how many of them must have the invalidating intent” and suggested that an invalid intent by the bill’s sponsor may be enough. *Id.* at 638. Moreover, he argued that “[t]o look for the sole purpose of even a single legislator is probably to look for something that does not exist.” *Id.* at 637. Scalia noted that a legislator in that case may have voted for several reasons such as fostering religion or education, providing “jobs for his district,” responding to “a flood of constituent mail,” or “accidentally voted ‘yes’ instead of ‘no,’ or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations.” *Id.* But see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 143 (1992) (arguing that “it would be unprincipled to abandon the purpose prong of the *Lemon* test on these grounds if the Court intends to inquire into legislative purpose in other contexts”).

her concurring opinion in *Lynch v. Donnelly*.³⁵⁰ The endorsement test has two prongs: 1) the “purpose prong . . . asks whether government’s actual purpose is to endorse or disapprove of religion;” and 2) “[t]he effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”³⁵¹ With respect to the purpose prong, Justice O’Connor has argued that “the secular purpose requirement alone may rarely be determinative in striking down a statute” but that “[i]t reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.”³⁵² With respect to the effect prong, Justice O’Connor emphasizes that “[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.”³⁵³ Consequently, under both the *Lemon* test and the endorsement test, the Court has required that laws must have a secular purpose and a primarily secular effect to meet the requirements of the Establishment Clause.

While I assume that government adoption of a religious justification for the law clearly has the effect of advancing or endorsing religion (i.e., violates the effect prong), the secular purpose analysis is not as straight forward. The Supreme Court has held in only five cases that statutes or other government activity advancing or protecting explicit religious teachings (e.g., the Ten Commandments and Creation Science) or religious practices (e.g., meditation or voluntary prayer) were unconstitutional because they lacked a secular purpose.³⁵⁴ In *Edwards v. Aguillard*, the Court clarified that “[a] religious purpose alone is not enough to invalidate an act of a

350. 465 U.S. 668 (1984). Just five years later, a majority of the Justices applied the endorsement test in their analysis of whether a crèche in the county courthouse and a menorah in front of a city-county building constituted an establishment of religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 579 (1989) (holding that the crèche violated the Establishment Clause but that the menorah did not). More recently, all the members of the Court have explicitly applied the endorsement test or joined in opinions applying the test. See *Mitchell*, 530 U.S. at 801 (holding that lending educational materials and equipment to public and private schools (including parochial school) does not violate the Establishment Clause).

351. *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring) (arguing that “[t]he endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect).

352. *Wallace*, 472 U.S. at 75-76 (O’Connor, J., concurring).

353. *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring).

354. *McCreary*, 545 U.S. 844 (2005) (holding the display of the Ten Commandments inside courthouses in Kentucky unconstitutional under the Establishment Clause because the display was motivated by a predominantly religious purpose); *Edwards*, 482 U.S. at 591 (holding unconstitutional Louisiana’s “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act” because “[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind”); *Wallace*, 472 U.S. at 40 & 61 (holding unconstitutional Alabama’s statute providing for a period of silence for “meditation or voluntary prayer” because the law lacked a secular purpose); *Stone v. Graham*, 449 U.S. 39, 39-41 (1980) (holding that a Kentucky statute requiring the posting of Ten Commandments on the wall of each public school classroom in the State unconstitutional because it had a “pre-eminent” religious purpose); *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968) (holding unconstitutional an Arkansas statute prohibiting the teaching of evolution in public schools and universities because the “sole reason” for the anti-evolution law was “that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group”).

state legislature. The religious purpose must predominate.”³⁵⁵ In these five cases, the statutes or other government activity violated the Establishment Clause because they were based on a predominant religious purpose rather than merely recognizing the symbolic or historic significance of religion. Similarly, under both the *Lemon* test and the endorsement test, adopting comprehensive secularism (under the modern paradigm) or a more traditional religious conviction (under the pre-modern paradigm) as the justification for government activity would constitute a predominant religious purpose. Religious convictions are the comprehensive condition of normative validity for all normative claims including legal ones. Consequently, if the state adopts religious convictions to justify its actions, the religious convictions by definition outweigh or predominate all other justifications for those actions and thereby violate the Establishment Clause.

However, in *McGowan v. Maryland*,³⁵⁶ the Supreme Court rejected the claim that the Establishment Clause is violated by “federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.”³⁵⁷ The Court further emphasized that:

In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.³⁵⁸

Even though the Sunday closing law originally had a religious origin, the Court rejected the Establishment Clause challenge because having “a uniform day of rest” was a significant secular purpose for such a law.³⁵⁹ *Harris v. McRae*³⁶⁰ presented a similar challenge to the Hyde Amendment, which prohibits federal Medicaid funds for most abortions. The plaintiffs argued

355. *Edwards*, 482 U.S. at 599; see also *Wallace*, 472 U.S. at 56 (stating that “the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion”); *Lynch*, 465 U.S. at 680 (emphasizing that “[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations”).

356. 366 U.S. 420 (1961).

357. *Id.* at 442.

358. *Id.*

359. *Id.* at 445. Cf. Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J. L. & PUB. POL’Y 1, 2 (2002) (arguing that the case law and doctrines that comprise contemporary Establishment Clause jurisprudence support his claim “that laws that are discernibly informed by religious moral premises” generally do not, by that fact alone, violate the First Amendment).

360. 448 U.S. 297 (1980).

that “the Hyde Amendment violates the Establishment Clause because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences.”³⁶¹ The Court held that the Hyde Amendment could just as well be “a reflection of ‘traditionalist’ values towards abortion” and that mere coincidence with Roman Catholic religious tenets, “without more,” does not constitute an Establishment Clause violation.³⁶²

Given this Supreme Court precedent, the secular purpose requirement must mean that the text of the law can only provide a noncomprehensive justification for its requirements. For example, criminal statutes prohibiting murder do not reference the Christian Bible, the Torah, or the Koran to justify this prohibition. The possible comprehensive justifications remain implicit. Similarly, judges should not cite passages from *Genesis*, *Leviticus*, and St. Thomas Aquinas, like Chief Justice Roy Moore of the Alabama Supreme Court has done, to justify “a strong presumption of unfitness” against homosexual parents for custody of their children.³⁶³ When judges reference only cases, statutes, legal principles, or public policy arguments, their opinions only provide noncomprehensive justifications for their decisions. The law implies comprehensive justifications but does not explicitly incorporate those comprehensive justifications into the law. Thus, the Supreme Court precedent requiring that the law have “a secular purpose” does not prohibit the law from implying a plurality of religious convictions as a foundation for law under a constructive postmodern paradigm of law and religion (*See Beyond Theocracy and Secularism (Part II)*). Rather, the secular purpose requirement prohibits adopting comprehensive convictions as a justification for the law. This includes liberal or republican forms of comprehensive secularism that attempt to mask their comprehensive or religious convictions as requirements that are neutral or impartial among different religions. As a result, contrary to the autonomy of law required by the modern paradigm, these forms of secularism represent a continuation of theocracy by other means and violate the Establishment Clause.

361. *Id.* at 319.

362. *Id.* at 319-20. By contrast, Justice Stevens stated in his dissent in *Webster v. Reproductive Health Services* that a Missouri law regulating abortion was unconstitutional for various reasons including a violation of the Establishment Clause. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 566 (1989). He argued that “the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution.” *Id.* Rather than maintaining that this statement merely coincided with certain religious tenets or that legislators were motivated by religious considerations, he maintained “that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.” *Id.* at 566-67. This may serve as a warning that judges should avoid taking positions on matters such as when life begins or ends. As indicated in Part V, these are essentially religious questions and unnecessarily answering them may lead judges to make their implicit comprehensive convictions needlessly explicit.

363. *See Ex Parte H.H.*, 830 So.2d 21, 26 (Ala. 2002).

VII. CONCLUSION

Isolating paradigms of law and religion has helped reveal key assumptions about law, religion, and their relationship that are rarely examined because they are reflexively taken for granted. The secularization of the law represents the most widely-held but least examined assumption of the modern paradigm of law and religion. In order to facilitate some critical distance on contemporary assumptions about secularization, I first analyzed its origin as a reaction to the religious pluralism and wars of religion in the sixteenth and seventeenth century resulting from the Protestant Reformation. The Reformation divided the Western part of the Christian tradition into separate confessional institutions including Roman Catholic, Lutheran, Calvinist, and Anabaptist institutions. Each of these confessions professed different theological interpretations of Christianity and its relationship to politics and law. Under the pre-modern paradigm, the religion of the ruler was the religion of the state and was imposed on dissenters to promote uniformity of belief and social stability. This produced conflict and eventually war among these confessional institutions for control of the state. This historical experience dramatically demonstrated the comprehensive nature of religious convictions and the religious pluralism that has become a permanent characteristic of Western culture.

Faced with the devastating wars of religion, the modern paradigm attempted to replace the religious legitimation of law under the pre-modern paradigm with a secular legitimation based on the Enlightenment notion of reason. The secular legitimation of law attempted to separate law and religion into autonomous spheres so that a plurality of religious traditions could coexist within a state. Under the modern paradigm, law dictated the place of religion in society and did not require religious legitimation. Law had a rational foundation that was “neutral” among the various religious confessions in a particular state. For Max Weber, the secularization or rationalization of law finally led to the autonomy of law as a formalistic system and a “legal science”. In its ideal form, he maintained that the legal system constitutes “a gapless ‘legal ordering’ of all social conduct” which seals law off from morality, politics, and religion.³⁶⁴

Contrary to Weber’s complete separation of law and religion, two quandaries or crises for legal theory—legal indeterminacy and the ontological gap between legal theory and legal practice—have called into question the modern paradigm and its notion of secularization of the law. Legal theorists (ranging from extreme-radical deconstructionists to contemporary legal formalists) overwhelmingly agree that the law is indeterminate and reject the strong legal formalism that secured the autonomy of law for Weber. The law is indeterminate because there are hard cases where the apparently relevant statutes, common law, contracts, or constitutional law provisions at issue fail to resolve disputes. From a descriptive standpoint, legal indeterminacy merely means that judges must rely on extralegal

364. 1 WEBER, *ECONOMY AND SOCIETY*, *supra* note 168, at 658.

norms to resolve hard cases. This may result in judges relying on religious norms in contravention to the secularization of the law. As a result, the advent of legal indeterminacy has called into question the secularization of the law as a descriptive assumption.

Legal indeterminacy thus shifts the burden of maintaining the secularization of law to normative theories of law. Within the modern paradigm, these normative theories require judges and legislators to justify the law without relying on religious convictions. Sections V and VI evaluated the main types of liberal and republican normative theories of law under the modern paradigm—represented by John Rawls, Jürgen Habermas, and French secularism—that attempt to legitimate the law independently of religious or comprehensive convictions. Each of these theories was shown to fail for several of the following reasons: 1) they denied legal indeterminacy; 2) they were incoherent; or 3) they required establishing a comprehensive secularism in violation of the Establishment Clause and a proper understanding of religious pluralism.

To clarify the discussion of religion, Ogden's account of religion and religious pluralism were set forth. Ogden maintains that any explicit comprehensive conviction about human authenticity is a religion. Religion not only includes the recognized world religions of Christianity, Judaism, Islam, Hinduism, and Buddhism, but it also includes humanism, capitalism (when proposed as a normative rather than as a positive theory), communism, and other so-called secular answers to the existential or comprehensive question. In this respect, French secularism constitutes a comprehensive or religious conviction about authentic human existence because it defines how citizens ought to live and dress in the public realm and specifies common values and interests for French citizens. Although less thorough-going, the liberal secularisms of Rawls and Habermas make similar comprehensive demands.

French republican secularism showed more concretely the problematic consequences that arise when comprehensive convictions—including the liberal secularism presupposed by Rawls and Habermas—are embraced by the state. The secularism that is implicit with Rawls and Habermas became explicit in the French headscarf crisis. This helped make it clear that secularism—whether the negative liberal form or the positive republican form—competes with traditional religions like Islam for identifying authentic human existence. In this respect, the modern paradigm was shown to be a continuation of the pre-modern paradigm by other means. The price of secularity for Rawls, Habermas, and French secularism included rejecting your religious convictions—the comprehensive condition of normative validity—as not rational so that everyone can accept the same “rational” foundation for the law. French secularism also made it clear that enforcing a unitary secular foundation for the law may further require sacrificing harmless religious practices like wearing headscarves in public school that pose little or no threat to the social order. Moreover, all of these forms of secularism failed to maintain the separation of law and religion required by

the modern paradigm and required establishing secularism as a state religion contrary to a proper understanding of religious pluralism and the Establishment Clause. The failure of these forms of secularism suggests that the simultaneous endorsement of legal autonomy and legal indeterminacy under the modern paradigm is misguided and that a new paradigm for law and religion is needed. Thus, giving up on the strong legal formalism posited by Weber requires forfeiting the secularization of the law (both descriptively and normatively) in ways not yet fathomed by contemporary legal theory.

This critique of the modern paradigm facilitated identifying the key assumptions about law and religion—such as secularization—that are often invisible to legal theorists because they are taken for granted. From the arguments and analysis in this article, it should be clear that a constructive postmodern paradigm must take into account the following factors about religion and law: 1) the comprehensive and narrative nature of religion; 2) the existence and normative implications of religious pluralism; 3) the consensus about legal indeterminacy; 4) the secularized text of the law; and 5) the need to close the ontological gap between legal theory and legal practice. The modern paradigm failed to reconcile these factors about law and religion into a coherent or adequate theory so that a new constructive postmodern paradigm of law and religion is needed to accomplish this task.

In *Beyond Theocracy and Secularism (Part II): A New Paradigm for Law and Religion*, my aim will be to provide a constructive postmodern paradigm that can reconcile these factors. Thomas Kuhn argues that showing flaws in paradigms is never enough to motivate others to reject the paradigm. Paradigm shifts require a new paradigm that solves crises—like legal indeterminacy and the ontological gap—that have eluded other paradigms. My thesis maintains that closing the ontological gap and providing a normative theory of law consistent with legal indeterminacy requires a *deseccularization of law* and a return to a religious legitimation of law. While the detailed argument will have to wait for Part II, *Beyond Theocracy and Secularism (Part I)* has laid out the trajectory for a new constructive postmodern paradigm of law and religion that embraces legal indeterminacy as a structural characteristic of law which allows for a plurality of religious convictions to implicitly legitimate the law and thereby close the ontological gap. A unitary religious (pre-modern) or secular (modern) legitimation of law appears to be an outdated or erroneous assumption of pre-modern and modern paradigms. It fails to take religious pluralism seriously. Rather than proposing a fixed, unitary foundation for the law, I will argue that the legitimation of law depends on the plurality of religious and comprehensive convictions in the culture. Under the constructive postmodern paradigm, the text of the law must be explicitly secularized (i.e., no explicit recognition of religion), but at the same time, the law is implicitly legitimated by a plurality of religious foundations. The constructive postmodern paradigm of law and religion thus leads to the *deseccularization of the law*.

Desecularization of the law does not suggest returning to an explicitly religious legitimation of law under the pre-modern paradigm like Former Chief Justice Roy Moore's attempt to enshrine the Ten Commandments as a symbol of "the sovereignty of the Judeo-Christian God over both the state and the church."³⁶⁵ While not technically a theocracy, Moore's position presupposes the pre-modern paradigm and attempts to impose a *de facto* Christian religious foundation on "the world's most religiously diverse nation."³⁶⁶ The Establishment Clause and a proper understanding of religious pluralism prohibit the law from explicitly adopting a religious legitimation. Also, reviving the pre-modern paradigm would foolishly ignore the lessons learned from the wars of religion after the Reformation. Although claiming to follow the modern paradigm, French secularism boiled down to a continuation of the pre-modern paradigm by other means. French secularism has forgotten these lessons and unnecessarily fueled conflict with French Muslims by prohibiting acts of Muslim piety (i.e., wearing headscarves) and imposing the religion of the ruler (i.e., French secularism) on French Muslims. Advocating a return to the pre-modern paradigm suggests that this position is the only alternative to the modern paradigm or the only one allowing for a religious legitimation of law.

Alternatively, the law may have a plurality of foundations which compete for allegiance and produce contradictory norms within the law. Bridging the ontological gap requires a new constructive postmodern paradigm that recognizes that a plurality of religious convictions implicitly legitimates the law. The constructive postmodern paradigm does not propose a unitary religious ontological foundation for law. Rather, it claims that each individual interpreting the law presupposes a religious ontological foundation. Ogden's definition of religion made it clear that religious convictions are the comprehensive condition of validity presupposed by any normative judgment. Also, recall that religious or comprehensive convictions include both an ethical aspect (a notion of authentic human existence) and a metaphysical aspect (the meaning of ultimate reality for us).³⁶⁷ The ontological gap implicitly acknowledges that each act of legal interpretation presupposes a religious ontology and a notion of authentic human existence. Taken collectively, there is a plurality of religious ontologies implicitly legitimating the law and closing the ontological gap.

At the same time, the secularization of law still has a normative meaning based on a proper understanding of religious pluralism and the Establishment Clause. To prevent cutting off the debate for religious truth and violating the Establishment Clause, the state may not embrace a particular religious conviction or religious tradition (i.e., the Ten Commandments)

365. *Glassroth*, 335 F.3d at 1284 (affirming that the monument violated the Establishment Clause and the order to remove it).

366. See generally Eck, *supra* note 29 (chronicling the increasing diversity of American religious practice and proposing a pluralistic vision for a new America).

367. See *supra* note 111.

and the law may not adopt a religious justification.³⁶⁸ The text of the law must remain secularized so that it includes only noncomprehensive rules and principles. Nevertheless, the secularized text of the law does not mean that the law has an autonomous secular foundation (*i.e.*, secularism). In *Democracy and Tradition*, religion scholar Jeffrey Stout argues that “[t]here is a sense in which the ethical discourse of most modern democracies is *secularized*, for such discourse is not ‘framed by a theological perspective’ taken for granted by all those who participate in it.”³⁶⁹ Secularized discourse, however, “is not a reflection of commitment to secularism.”³⁷⁰ Stout further emphasizes that a secularized modern democratic discourse does not “involve endorsement of the ‘secular state’ as a realm entirely insulated from the effects of religious convictions, let alone removed from God’s ultimate authority. It is simply a matter of what can be presupposed in a discussion with other people who happen to have different theological commitments and interpretive dispositions.”³⁷¹

However, the law implies religious or comprehensive convictions about authentic human existence. The legitimation of law is provided by a plurality of religious and comprehensive convictions which must always remain implicit. For example, many religious or comprehensive convictions support the legal prohibition of murder, but the text of the law does not explicitly adopt any of these religious justifications. In other words, the text of the law does not provide a religious or comprehensive justification for prohibiting murder but only implies them. Religious pluralism and the Establishment Clause require this normative theory of secularization.

Despite the secularization of the text of the law, this new paradigm results in a legitimate plurality of religious convictions implicitly legitimating the law and thereby *deseccularizing the law*. The trajectory for this new constructive postmodern paradigm of law and religion has been shown to embrace legal indeterminacy as a necessary structural characteristic of law to provide for a pluralistic religious legitimation of law that will close the ontological gap while maintaining the secularization of law in the sense that the text of the law makes no explicit recognition of any official religious foundation. The plurality of religious foundations are only implied by the law. A more detailed account of this new constructive postmodern paradigm will have to wait for a subsequent article entitled *Beyond Theocracy and Secularism (Part II): A New Paradigm for Law and Religion*.

368. See *Ex Parte H.H.*, 830 So.2d at 26 (Moore, C.J., concurring) (citing passages from *Genesis*, *Leviticus*, and St. Thomas Aquinas to justify “a strong presumption of unfitness” against homosexual parents for custody of their children).

369. Stout, *supra* note 2, at 93.

370. *Id.* Like Ogden, Stout considers secularism an ideology that competes with religious traditions for ultimate commitment. *Id.* at 97.

371. *Id.*

