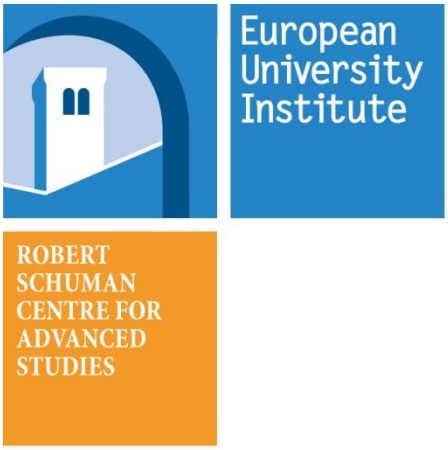

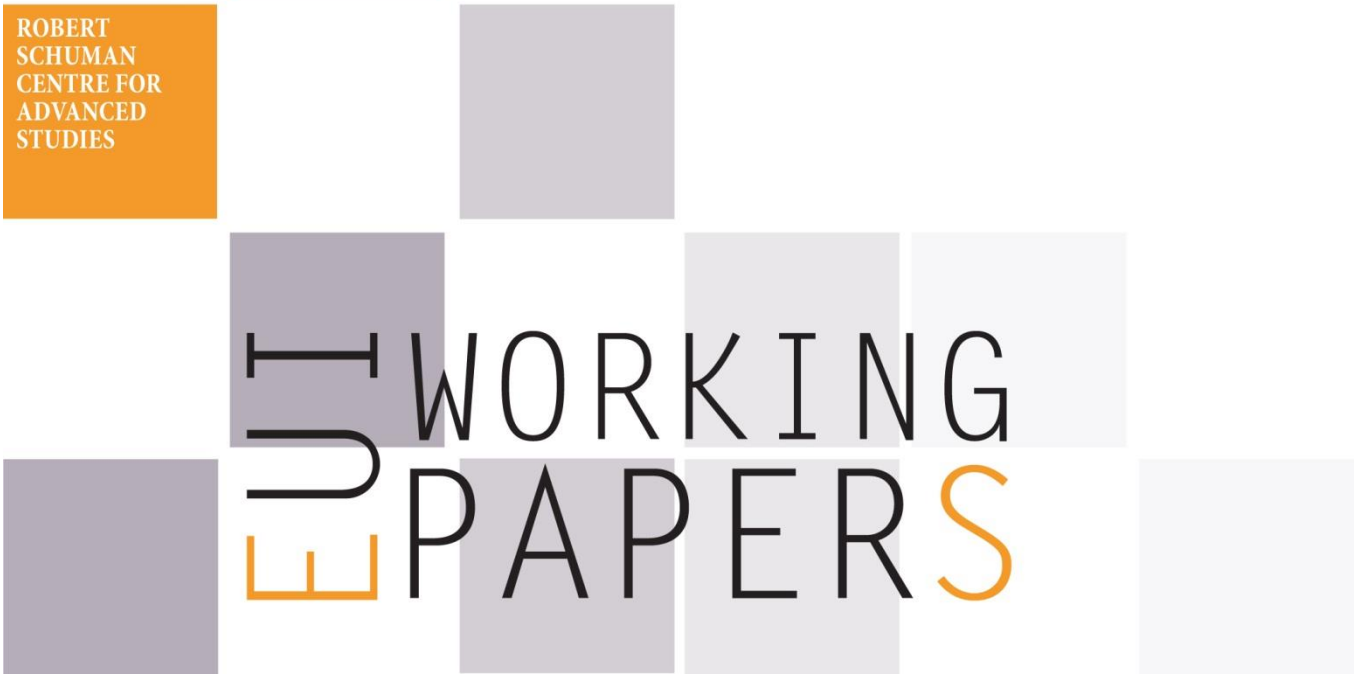

RSCAS 2014/94
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Abstract

This paper compares the law and religious jurisprudence of the U.S. Supreme Court and the European Court of Human Rights across three legal areas: individual religious freedom, institutional religious freedom/freedom of the church, and religious symbols/church-state relations. Particular focus is given to the manner in which this jurisprudence reveals the underlying structure and meaning of the secular. While there remains significant jurisprudential diversity between these two courts and across these different legal areas, there is also emerging a shared accounting of religion, secularity, and moral order in the late modern the West. These legal systems will increasingly be defined by their similarities more than their differences.

Keywords

United States Supreme Court; European Court of Human Rights; Religious Freedom; Freedom of the Church; Religious Symbols; Secular; Liberalism

I. Law in the Secular Age

No category is more significant for understanding the structure of law and religion jurisprudence in the West than the secular. The most significant law and religion debates of the day concern the meaning of the secular, even when the legal questions are not expressly framed in such terms. The fundamental issue of modern politics is the secular, and law in turn is intimately engaged in constructing it. Law is the scaffolding that gives shape and definition to the secular. It is the site of negotiation over the meaning of the secular. The secular, after all, is not an abstract formulation, but a form of moral order that finds expression in and through law. Law carves meaning into the secular world and mediates experiences of it. But this is not a unidirectional phenomenon, for the conditions of secular order also impact the logic of law. Law and the secular exist in a dialectical relationship such that neither law nor the secular can be properly understood without considering the ways in which they mutually inform each other.

There is, of course, a vast literature on the secular and post-secular.[1] Yet, on the whole, little attention has been given to the ways that law might illuminate our understanding of the secular. Legal scholars have likewise given relatively little attention to how the category of the secular might illuminate law and legal theory.[2] As such, one overarching concern of this paper is to assess how law has shaped, and been shaped by, competing conceptions of secular order. It aims to pull the secular more fully into conversation with law, and law more fully into conversation with the secular.

What, though, do we mean by the secular, a complex yet often facilely invoked term? On one level, the secular refers simply to that which is profane and not sacred. The secular refers to the space within which persons and communities pursue certain limited and temporal goods. From this perspective, the secular need not be framed in "radical opposition to the sacred."[3] It is rather, in its historical formulation, a jurisdictional category. As Abdullahi An-Na`im observes, "The word 'secular' in the English language derives from the Latin word *saeculum*, meaning 'great span of time' or, more closely, 'spirit of the sage'….Eventually the term came to be understood as reflecting a distinction between secular (temporal) and religious (spiritual) concepts."[4] Indeed, it has been argued that the secular, far from being anti-religious, was in important respects a creation of the Christian West.[5]

These historical and genealogical considerations aside, the secular has come to mean something more than a distinction between sacred and profane. Modernity did not invent the secular, but certainly vested it with new meaning. Most importantly, the secular is no longer widely understood to be a jurisdictional category (i.e. distinguishing the domain of the church from the state) but rather an

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1 The literature on the secular and post-secular traverses a number of disciplines and is, of course, far too expansive and diverse to survey here. For a survey of important scholarship, see Slavic Jakelić, "Secularism: A Bibliographic Essay," *The Hedgehog Review* (Fall 2010): 49-55.

2 There are some indications that legal scholars are beginning to engage the issue of the secular more directly, though the literature remains small and undeveloped. On the whole, there is greater and more sophisticated work on the topic emerging from European thinkers. For a survey of recent books in this area see, Zachary R. Calo, *Law in the Secular Age*, Forthcoming, *European Political Science.* For important books in American scholarship, see Bruce Ledewitz, *Church, State, and the Crisis in American Secularism* (Bloomington: Indiana University Press, 2011); Steven D. Smith, *The Disenchantment of Secular Discourse* (Cambridge: Harvard University Press, 2010).

3 Robert A. Markus, *Christianity and the Secular* (South Bend: University of Notre Dame Press, 2006): 5. The essays collected in "Conference: Laïcité in Comparative Perspective," *Journal of Catholic Legal Studies* 49:1 (2010) provide a useful survey of important contemporary issues.

4 Abdullahi Ahmed An-Na`im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge: Harvard University Press, 2008): 36

5 See, generally, Markus, *Christianity and the Secular.* See also, Peter J. Leithart, *Defending Constantine: The Twilight of an Empire and the Dawn of Christendom* (Downers Grove: InterVarsity Press, 2010).

ontological one. It represents a way of being and living in the world that is inseparable from western identity and self-understanding. As such, we no longer simply inhabit secular political space but rather what Charles Taylor calls "A Secular Age."[6] In this respect, the secular has come to refer to deeper forms of social meaning and order. Although a sharp departure from older forms of understanding, "[t]he secular as most people now understand it is a deeply anti-religious creation."[7] It is this notion of the secular that dominates political discourse about the relationship between religion and secularism.

This understanding of the secular puts religion in a more politically marginalized position. As Taylor notes, while "the political organization of all pre-modern societies was in some way connected to…faith in, or adherence to God, or some notion of ultimate reality," politics in modern secular societies occurs "without ever encountering God."[8] Secular politics, Taylor seems to be saying, reflects an imaginative universe that does not depend on divine authority for its meaning or legitimacy. There is no longer any appeal made to external sources of authority as the ground of politics.[9] Political meaning in the secular age has been desacralized at the level ontological meaning.

Modern secular order has also transformed the shape of law and legal theory. The most obvious manifestation of this change has been in church-state relations.[10] Yet this represents only the most surface change. The deeper impact on law has occurred at the level of conceptual jurisprudence. Law in modernity is organized as an autonomous expression of human will, governed by its own internal rationality and existing fully apart from any participation in a divine economy.[11] Theological categories still exist in the shadows, as Carl Schmitt diagnosed.[12] Yet religion now resides outside of law, tolerated but lacking any role in structuring jurisprudence at the level of conceptual meaning. As Remi Brague observes, "in modern societies, law, far from being conceived of in any relation with the divine, is quite simply the rule that the human community gives itself, considering only ends that it proposes for itself."[13] Religion still informs law, but in more indirect ways. Thus John Witte speaks of the ways that religion "gives law its spirit and inspires its adherence to ritual and justice. Law gives religion its structure and encourages its devotion to order and organization."[14]

The fundamental matter of law's ontological severance from religion is settled. Western law exists in the aftermath of what Mark Lilla terms the "Great Separation."[15] Yet, while modernity transformed the relationship between law and religion, there remains vigorous debate about the contours of the resulting settlement. The place of religion within this secular legal order is still contested, even if the boundaries of debate are limited. There is no one secular, no one modernity, no single model for relating religion and law. There are rather competing seculars that advance different accounts of the

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6 Charles Taylor, *A Secular Age* (Cambridge: Harvard University Press, 2007)

7 Ian T. Benson, "The False Struggle between Believers and Non-believers," *Oasis* (December 12, 2010): 22.

8 Taylor, *A Secular Age*, 1.

9 Taylor, 2.

10 In describing impact of secularization on legal structure, Charles Taylor observes the following: "There are at least two models of what constitutes a secular regime. Both involve some kind of separation of church and state. The state can't be officially linked to some religious confession, except in a vestigial and largely symbolic sense, as in England or Scandinavia. But secularism requires more than this. The pluralism of society requires that there be some kind of neutrality…" Charles Taylor, "The Meaning of Secularism," *The Hedgehog Review* (Fall 2010): 1.

11 Aquinas's fourfold division of law – eternal law, natural law, human law, and divine law – in the *Summa Theologiae* is emblematic of premodern modes of relating law and theology.

12 Schmitt famously proposed that, "All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state." Carl Schmitt, *Political Theology* (Chicago: University of Chicago Press, 1985): 36.

13 Rémi Brague, *The Law of God: The Philosophical History of an Idea* (Chicago: University of Chicago Press, 2007): 1.

14 John Witte, "The Study of Law and Religion in the United States: An Interim Report," *Ecclesiastical Law Journal* 24 (2012): 327.

15 Mark Lilla, *The Stillborn God* (New York: Knopf, 2007).

place of religion within the secular legal order. Indeed, what is most fundamentally at issue in law and religion jurisprudence is the meaning of the secular nomos to which modernity gave birth.

Law and religion debates are often framed as binary disputes between religious and secular values. This interpretation is understandable and no doubt reflects the increasingly polarized cultural and social dynamics in the West. The movement of people away from tradition religious beliefs and institutions pulls debate in one direction. Resurgent religious belief pulls in the other.[16] Genuine conversation appears increasingly difficult, if not impossible.[17] The stakes seem greater, the debate more absolute, common ground ever shrinking. Law is thus left to decide through force of decision that which cannot be achieved through culture. As such, law is vested with the burden of determining victory in a winner-take-all struggle.

There is a certain truth to this understanding of what law and religion cases have come to represent, but it also misses the full complexity of the present situation. It is misguided to frame law and religion jurisprudence in the West on simple binary terms. What is more basically at issue is not the normative validity of the secular as such, but rather the form of secular order that will predominate. To describe the situation on these terms is not mere linguistic sleight of hand but a way of emphasizing the extent to which nearly all partisans accept certain basic premises of legal modernity. It is best to view the encounter between religious and secular values within law on dialectical rather than binary terms. The jurisprudence consists not of an all or nothing resolution but a slow and oftentimes uneven making and remaking of the secular.

The aim of this paper is to incorporate the category of the secular more fully into the study of law and religion, while also moving beyond a binary formulation of the legal debates. It proceeds by considering such questions as: How has law been shaped by competing conceptions of the secular? What are the implications of this process for the relationship between law and religion? What do debates within law and religion reveal about the structure of modern moral order? Are there common impulses shaping law and religion jurisprudence in the West? The paper explores these questions by surveying the law and religion jurisprudence of the European Court of Human Rights and the United States Supreme Court. It proceeds by investigating three different areas – individual religious freedom, institutional religious freedom, and the symbolic relationship between religion and state. By so doing, consideration is given to the varying ways in which the legal treatment of religion shapes conceptions of selfhood, society, and the state. While by no means comprehensive, these three areas represent central points of engagement between law and religion and collectively provide insights about the structure and meaning of secular order.

In brief, it is argued that these two bodies of jurisprudence reveal the emergence of a shared form of secular order across the United States and Europe. Law, moreover, is a main site of negation about the terms on which religion might inform the secular. In both systems, law is secularizing and generating certain barriers to religion maintaining a stable place within the social order. Yet, law is not shaping politics and culture through the imposition of an ideological secularism, but rather by severing law from any determined moral meaning. Law, in this respect, has not advanced a form of secular order that is fundamentally anti-religious. Partisans who see in law and religion doctrine either a creeping secularism or a creeping theocracy miss the larger point. Law's secularity, as it has taken

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[16] John Micklethwait and Adrian Wooldridge, *God is Back: How the Global Revival of Religion is Changing the World* (New York: Penguin, 2009); Monica Duffy Toft, Daniel Philpott & Timothy Shah, *God's Century: Resurgent Religion and Global Politics* (New York: W.W. Norton, 2011). On changing religious dynamics in the United States see, "*Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation* (Pew Research Center, 2010).

[17] As Charles Mathewes observes, "These days we seem to have trouble conducting genuine conversations about religious belief….Some secularists deem it the height of philosophical sophistication to view those who take a sacred text seriously as akin to those who take up serpents….A similarly smug knowingness also infects many believers, seducing them into dismissing the challenges skeptics raise just because those challenges are raised by skeptics." Charles Mathewes, "What's God Got to Do with Religion?" *The American Interest* (June 17, 2014).

shape in law and religion cases, is less an affirmative ideology than an expression of late modernity's exhaustion. Law discloses a secular order defined more by a void than by a determined form of meaning.

A central way in which this void reveals itself is through the legal construction of a liberalism that emphasizes the primacy of the individual as the site of moral meaning-making. The Supreme Court and the European Court of Human Rights have responded to conflict by creating space in which individuals and communities engage in their own forms of moral expression. The secular, in turn, becomes a space increasingly defined by the absence of thick moral meaning. In the aggregate, this situation has produced a legal arrangement broadly favorable to religious freedom. Yet it is equally proving to be a thin foundation on which to build a sustainable order. It liberates religion but also creates new barriers.

The treatment of law and religion issues also reveals the increasingly contested nature of secular order in the West. On one hand, the jurisprudence of law and religion participates in a secularization process that continues to dislocate religion in various ways. At the same, it is erroneous to interpret this process as a straightforward movement in the direction of greater secularization, as if law is simply further marginalizing religion. The secular order revealed in this jurisprudence neither rejects religion nor depends on it. Religion has been relocated, just as much as it has been than dislocated. Echoes of older forms of moral order linger, even as law's modernity pushes religion more to the margins of political meaning. Law's secularization remains incomplete.

II. Self: Individual Religious Freedom

The jurisprudence of individual religious freedom ranges across a vast array of issues. There nevertheless are certain general themes and impulses that have emerged in American and European case law. This analysis proceeds by exploring how the Supreme Court and the European Court of Human Rights have addressed four issues that implicate individual religious freedom: proselytism, conscientious objection, religious dress, and employment.

The Constitution of the United States, through its speech and religion clauses, affords broad protection to the sort of activities that constitute proselytism. Many of the central issues are well-settled and uncontroversial. Constitutional law nevertheless "currently supports numerous limitations on proselytism."[18] For instance, there are situations in which the government can require a permit prior to engaging in religious speech.[19] Thus, while the state cannot require licensure before a person can go door-to-door sharing a religious message, it has some discretion to require registration or licensure before participating in such activities as a parade or festival.[20]

U.S. courts have also granted wide protection to individual religious freedom in the area of conscientious objection, which involves the relationship between the individual and the state in its starkest form. Recognition of conscientious objector rights has generally been provided through statutory provision rather than constitutional principle. A notable feature of cases in this area, however, has been the broad interpretation courts have given to the scope of statutory protection. In the 1943 case of *United States v. Kauten*, for instance, the Court of Appeals for the Second Circuit interpreted the phrase "religious training and belief" as encompassing convictions which arise "from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe — a sense common to men in the most primitive and in the most highly civilized societies."[21]

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[18] Howard O. Hunter and Polly J. Price, *Brigham Young University Law Review* (2001): 538.

[19] See, for instance, Cox v. New Hampshire, 312 U.S. 569 (1941); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

[20] Lovell v. Griffin, 303 U.S. 444 (1938)

[21] United States v. Kauten, 133 F.2d 703, 708 (1943).

This decision was of enduring significance because it held that something less than belief in God could constitute a "religious" belief.[22] *Kauten* remains noteworthy for having offered a functional, rather than substantive philosophical, definition of religion. *Kauten* furthered the process by which American law defined religion not in terms of the relationship of persons to God or gods but the relationship of persons to each other and the ethical ordering of the universe.

This trend continued in *United States v. Seeger* (1965) and *Welsh* v. *United States* (1970) when the Supreme Court severed religion not only from any connection to a supreme being but also any necessary source outside the ethical convictions of the self. In *Seeger*, the Court interpreted the statutory definition of "Supreme Being" as referring to "a given belief that is sincere and meaningful…in the life of its possessor" in a manner "parallel to that filled by the orthodox belief in God."[23] *Welsh* pushed the interpretive logic of *Seeger* even further, holding that the First Amendment protects "moral, ethical or religious beliefs about what is right and wrong" that are held "with the strength of traditional religious convictions." Religion was defined in radically subjective terms that encompassed "beliefs which are purely ethical or moral in source and content but that nevertheless impose…a duty of conscience."[24] Religion thus included the non-religious, so long as the beliefs represent an "ultimate concern" in the life on the individual. The connection between religion and theism, as well as religion and any metaphysical system, was shattered. Religion collapsed into the ethical.

As with proselytism and conscientious objection, the Supreme Court has broadly protected the right to expression through wearing religious dress. One area of dispute concerns the wearing of religious garments and symbols in public institutions. With respect to public schools, the Supreme Court has held that students retain constitutional rights to religious speech and expression, including the right to wear ceremonial religious clothing and clothing containing religious messages.[25] A lower federal court similarly ruled that a school could not prohibit a student from wearing a shirt with a Bible verse and critical statements about homosexuality, abortion, and Islam.[26] On the other hand, the Supreme Court's 2007 decision in *Morse v. Frederick* held that administrators could suppress student speech advocating illegal drug use at a school-sponsored event.[27] While the opinion was narrowly tailored to encompass only endorsement of illegal drugs, the underlying principle could be expanded to encompass other activities, including religious speech.

The military has been another site of conflict over religious dress, with the 1986 case *Goldman v. Weinberger* of particular importance. Goldman was an Air Force officer who wore a yarmulke in accordance with his Orthodox Jewish faith. He had done so for many years without incident, when a commanding officer charged that wearing the yarmulke violated Air Force regulations prohibiting headwear indoors. Goldman brought suit claiming a violation of his First Amendment free exercise rights. In ruling against Goldman, the Supreme Court stressed that "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." While the military context does not render constitutional protections "entirely nugatory," "great deference" must nevertheless be given to the judgments of military leadership. In a strongly worded dissent, Justice Brennan argued that, "The Air Force has failed utterly to furnish a credible explanation why an exception to the dress code permitting

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22 This marked a turning away from 19th certain century precedent which tended to conflate religion with Christianity or at least monotheism. See, e.g., Davis v. Beason, 133 U.S. 333 (1890); Church of the Holy Trinity v. United States 143 U.S. 457 (1892).

23 United States v. Seeger, 380 U.S. 163, 166 (1965).

24 Welsh v. United States, 398 U.S. 333, 340 (1970).

25 See, Tinker v. Des Moines, 393 U.S. 503 (1969)

26 Nixon v. Northern Local School District Board of Education, 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005).

27 Morse v. Frederick, 551 U.S. 393 (2007)

Orthodox Jews to wear neat and conservative yarmulkes while in uniform is likely to interfere with its interest in discipline and uniformity."[28] The Court, Brennan claimed, had unnecessarily forced Jewish service members to choose between religious obligations and service to country.

The issue of religious dress is rarely a point of contest in the United States. There has not been controversy similar to recent debates in Europe over Islamic headscarves or even Christian symbols. In general, the law has granted broad protections to persons to wear religious dress. This reflects, among other things, the weight given to individual religious expression. However, it is not implausible to read recent cases as also revealing a hesitancy to allow law to become overly deferential to religion persons. In several instances, the Court permitted restrictions on religious expression in favor of cultivating spaces and institutions denuded of religious particularity. One must however be careful in generating broad conclusions from these narrow judgments.

Lastly, another significant site of contest over individual religious freedom is employment. Much of the law concerning religion and employment in the United States is addressed through federal civil rights laws, especially Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating on the basis of religion. Particularly relevant is a 1972 amendment placing an affirmative obligation on employers to "reasonably accommodate" the religious practices of an employee, so long as doing so does not create an "undue hardship." Because of this amendment, employers can be required to accommodate employees' religious beliefs in such ways as scheduling shifts around the Sabbath, providing a place for prayer, and permitting the wearing of religious dress.

An area of growing conflict involves workplace tension between religious conscience and non-discrimination laws.[29] Cases have arisen, for instance, in connection with state laws requiring pharmacists to dispense oral contraceptives, including the morning-after pill, that some deem abortifacients. A number of courts, including state courts in Illinois and Wisconsin and a federal court in Washington State, have issued rulings that protect the conscience rights of pharmacists from these laws.[30]

A similar conflict was at issue in *Elane Photography, LLC v. Willock*. This case involved a wedding photography company, owned by devout Christians, who refused to provide services at the ceremony of a same-sex couple. The New Mexico Supreme Court ruled the company violated the New Mexico Human Rights Act prohibiting public accommodations from discriminating on the basis of sexual orientation. Referencing the United States Supreme Court's decision in *Employment Division v. Smith*, the New Mexico court held that applying the Human Rights Act did not violate Elane Photography's First Amendment Free Exercise Rights. Perhaps the most revealing discussion appeared in the concurring opinion of Justice Bosson, who argued that the "case provokes reflection on what this nation is all about, its promise of fairness, liberty, equality of opportunity, and justice. At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less." This statement captures the judge's belief that the fundamental value at issue in such disputes is equality, and that preservation of a certain form of equality is essential to advancing pluralistic commitments. The countervailing value of religious freedom is that which must here be sacrificed. The meaning and boundaries of religious freedom will be ever more tested in cases such as this, which place religion at the crosshairs of the competing values of freedom and equality.

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[28] Goldman v. Weinberger, 475 U.S. 503, 507-510 (1986)

[29] See, generally, Robert Vischer, *Conscience and the Common Good* (New York: Cambridge University Press, 2010); Martha S. Swartz, ""Conscience Clauses" or "Unconscionable Clauses": Personal Beliefs Versus Professional Responsibilities," *Yale Journal of Health Policy, Law and Ethics* 6:2 (2006): 269-350.

[30] Morr-Fitz, Inc. et al., v. Pat Quinn, Governor, et al. 2012 IL App (4th) 110398; Stormans v. Selecky, 586 F.3d 1109 (2009).

As with the Supreme Court, the European Court of Human Rights has given widespread protection to individual religious freedom, though it has arguably done so in a more qualified manner. Individual claims of religious freedom have, at times, been given less deference than countervailing claims by the state or other entities.

Proselytism has had an important role in shaping the European Court's Article 9 jurisprudence. It was through anti-proselytism law that the European Court developed its most enduring statement about the structure and aims of religious freedom. In the 1993 case *Kokkinakis v. Greece*, the Court held that application of a Greek statute prohibiting proselytism violated Article 9. This case involved prosecution of a Jehovah's Witness for proselytizing the wife of a local Orthodox cantor. The Court held that Mr. Kokkinakis's Article 9 rights had been violated because the Greek court had not established that the "conviction was justified in the circumstances of the case by a pressing social need." It is important to note, however, that the European Court found application of the statute to be in violation of Article 9, not the statute itself. In fact, the Court seems to have expressly granted states the right to limit certain forms of proselytism in noting that "a distinction has to be made between bearing Christian witness and improper proselytism." The Greek law in question is permissible so long as it targets improper proselytism, even though it failed to meet that requirement in this case.

The most enduring aspect of the European Court's ruling in *Kokkinakis* was the manner in which it linked proselytism to a larger vision of religious freedom. The following statement has proven particularly significant:

> As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.[31]

This claim, repeatedly cited in subsequent decisions, connects religious freedom to the values of democratic pluralism. Even more so, *Kokkinakis* identifies protection of individual religious freedom as essential to preserving pluralism. The implications of this connection have been repeatedly tested in subsequent religious freedom disputes.[32]

The European Court was relatively slow to grant protections for conscientious objectors. In an early 1965 case, the European Commission found that states did not have an obligation under Article 9 to recognize claims to conscientious objection.[33] Subsequent cases revealed an opening in the Court's approach, though it was the 2003 decision in *Bayatyan v. Armenia* that brought about a significant shift in direction.[34] The Court in *Bayatyan* held that Armenia had violated the Article 9 rights of a Jehovah's Witness by convicting him of draft evasion, a decision that markedly expanded the protections for religious freedom under the European Convention. The Court concluded "that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance

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31 Kokkinakis v. Greece, App. No. 14307/88, §31 (1993).

32 See, Nicholas Hatzis, "Neutrality, Proselytism, and Religious Minorities at the European Court of Human Rights and the U.S. Supreme Court" *Harvard International Law Journal* 49 (June 22, 2009): 120-131.

33 Grandrath v. Federal Republic of Germany, App. No. 2299/64 (1965). See Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (New York: Oxfod, 2001): 171-174.

34 Tsirlis and Kouloumpas v. Greece, App. No. 19233/91 (1997); Thlimmenos v. Greece, App. No. 34369/97 (1998).

to attract the guarantees of Article 9."[35] With reference to *Kokkinakis*, the *Bayatian* decision concludes that broadminded respect for minority religious views helps "ensure cohesive and stable pluralism and promote religious harmony and tolerance in society."[36]

While *Bayatyan* expanded Article 9 rights, the European Court's decisions in the area of religious dress have proven more restrictive. This issue, perhaps better than any other, captures important differences between U.S. and European case law on individual religious freedom. Most notable are a series of decision in which the Court upheld state bans on the wearing of Islamic headscarves.[37] In *Dahlab v. Switzerland*, the Court held that a primary school teacher's Article 9(2) right to manifest religious beliefs was outweighed by the state's interest in "protecting the rights and freedoms of others and preserving public order and safety."[38] In *Sahin v. Turkey*, the Court held there was no violation of Article 9 when the University of Istanbul prohibited students from wearing headscarves. The Court emphasized that religious freedom can be restricted "in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[39] Finally, in *Dogru v. France*, the Court found that an eleven year old Muslim student's Article 9 rights had not be violated when she was disciplined for wearing a headscarf in a physical education class.[40] Most recently, the Court upheld France's ban on the wearing of the burqa.[41]

On one level, these cases are merely prudential exercises in balancing Article 9 with state interests pursuant to the margin of appreciation doctrine. Yet these cases must equally be read as a collective statement on the status of individual religious freedom in Europe. It is notable that the Court's decisions in this area stand in some ineluctable tension with *Kokkinakis's* account of pluralism as a necessary feature of democratic society. Against *Kokkinakis*, the Court's judgments limited religious pluralism in order to preserve the predominance of a secularist public order. Religious freedom is not presented as an essential component of the democratic order, but as a potential problem that must be contained.

Decisions rendered in the headscarf cases also stand in tension with aspects of the Court's recent decisions in *Eweida vs. United Kingdom*. In one decision, the Court held that British Airways's refusal to permit Nadia Eweida, a check-in desk employee, to wear a visible Christian cross interfered with her Article 9 rights. The Court noted "that the refusal by British Airways…to allow the applicant to remain in her post while visibly wearing a cross amounted to an interference with her right to manifest her religion."[42] This case differed from the headscarf cases in that a private company rather than government implemented the ban. In reviewing the decisions of British courts, the European Court held that "a fair balance was not struck" between the interests of the company and the employee.[43] In particular, the Court maintained that too much weight was given to British Airways's "wish to project a certain corporate image."[44] Although a legitimate aim, it must be weighted against Eweida's Article

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35 Bayatyan v. Armenia, App. No. 23459/03, §110 (2011).

36 Bayatyan v. Armenia, App. No. 23459/03, §126 (2011).

37 Carolyn Evans, "The 'Islamic Scarf' in the European Court of Human Rights," *Melbourne Journal of International Law* 7 (2006): Sally Pei, "Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights," *The Yale Law Journal* 122:4 (2013): 1089-1102.

38 Dahlab v. Switzerland, App. No. 42393/98, §4 (2001).

39 Leyla Sahin v. Turkey, App. No. 44774/98, §106 (2004).

40 Dogru v. France, App. No. 27058/05 (2009).

41 S.A.S. v. France, App. No. 43835/11 (2014).

42 Eweida vs. United Kingdom, App. No. 48420/10, §91 (2013).

43 Eweida vs. United Kingdom, App. No. 48420/10, §94 (2013).

44 Eweida vs. United Kingdom, App. No. 48420/10, §94 (2013).

9 rights. Moreover, "There was no evidence that those who wore other authorized items of religious clothing, such as turbans and hibjabs, had any negative impact on British Airways' brand or image."[45]

In *Eweida*, the European Court addressed a companion case involving Shirley Chaplain, who had also wanted to wear a cross in the course of her employment. Chaplin worked as a nurse in a British hospital and had worn a cross on her neck since being confirmed in 1971. The hospital, however, maintained a uniform policy that prohibited wearing necklaces in order to reduce risk of injury when handling patients. Chaplain's refusal to follow the policy ultimately resulted in her being transferred to a non-nursing position. In distinguishing Chaplain's situation from Eweida's, the Court concluded that "the reason for asking [Chaplain] to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied [to Eweida]."[46] The hospital therefore deserved a wider margin of appreciation than British Airways. The Court found no Article 9 violation.

It is difficult to derive a clear principle from these two decisions, which rest on a balancing of interests. The headscarf cases are a different matter altogether and are troubling in the way they disclose the marginalized position of Islam within the Court's jurisprudence.[47] Whereas an ornamental Christian cross has a certain acculturated banality that fails to pose any significant challenge to a secular ethos, the headscarf poses an affront to secular order. Pluralistic commitments collapse when confronted with strong religion. Can these cases be explained simply by reference to margin of appreciation? Perhaps, though it seems the decisions are not about mere deference but rather involve the active construction of legal and political meaning.[48]

Also addressed in *Eweida* was the interaction of religious conscience with employment policy. The particular issue was whether a religious objection to homosexuality should permit an employee certain exemptions from work requirements. The first case involved Lillian Ladele, a Christian, who was employed by the London Borough of Islington as a registrar of births, deaths and marriages. The Civil Partnership Act provided for the registration of same sex civil partnerships in the United Kingdom and Islington designated all registrars as civil partnership registrars. In spite of holding religious objections, Ladele was ordered to carry out administrative duties involving civil partnerships. Ladele "accepted that the aims pursued by the local authority were legitimate, namely to provide access to services, irrespective of sexual orientation…. However, she did not consider that the Government had demonstrated that there was a reasonable relationship of proportionality between these aims and the means employed."[49]

The second case involved Gary McFarlane, also a Christian who objected to homosexual activity and who worked as a counselor with a private firm offering sex and relationship counselling. The employer maintained an Equal Opportunities Policy which provided that no client receive less favorable treatment because of sexual orientation. When McFarlane expressed concerns about working with same-sex couples, the employer was unwilling to filter clients so as to shield McFarlane. McFarlane was eventually dismissed from his employment.

The Court rejected the complaints of both Ladele and McFarlane. In rather cursory evaluations, the Court referenced the margin of appreciation in refusing to find violations of Article 14 and Article 9. With respect to Ladele, the Court noted that it "generally allows the national authorities a wide margin

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45 Eweida vs. United Kingdom, App. No. 48420/10, §94 (2013).

46 Eweida vs. United Kingdom, App. No. 48420/10, §99 (2013).

47 Silvio Ferrari, "Law and Religion in a Secular World: A European Perspective," *Ecclesiastical Law Journal* 14:3 (September 2012): 355-370.

48 Zachary R. Calo, "Pluralism, Secularism, and the European Court of Human Rights," *Journal of Law and Religion* 26 (2011): 261-280.

49 Eweida vs. United Kingdom, App. No. 48420/10, §72 (2013).

of appreciation" in balancing competing rights and that in this instance the local authorities did not "[exceed] the margin of appreciation available to them."[50] The Court adopted a similar approach with McFarlane in considering "whether a fair balance was struck between the competing interests at stake." It concluded that government authorities "benefited from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane's right to manifest his religious belief and the employer's interest in securing the rights of others. In all the circumstances, the Court does not consider that this margin of appreciation was exceeded in the present case."[51]

While there is nothing facially incoherent about these decisions, the invocation of margin of appreciation is done without a discernable pattern.[52] As in the headscarf cases, deference to margin of appreciate seems to depend less on a principled refusal to preempt national authorities than a normative judgment about the claims at issue. In the end, the Court was willing to affirm religious rights with respect to symbolic matters than determined beliefs and concrete expressive acts.

It is difficult to render a general conclusion about the status of individual religious freedom in American and European law, but there are certain themes and tendencies that might be identified. U.S. law remains broadly protective of individual religious freedom. In important respects, these protections have expanded in recent years through both First Amendment case law and statutory exemptions. Narratives of decline that see religious rights being under assault give inadequate attention to the many ways in which American law has preserved and expanded protections for individuals. European law also affords broad protections to individual religious freedom, though the Europe Court has circumscribed the scope of these rights more than the Supreme Court. The cases involving Islamic headscarves and religious expression in the workplace highlight the European Court's willingness to accept limitations on religious freedom that would not be permissible under First Amendment jurisprudence.

Some points of tension between American and European law reflect different attitudes toward the relationship between freedom and equality. Martha Nussbaum, for instance, has argued that U.S. law privileges freedom while European law privileges equality.[53] This is a generalization, to be sure, but one with some warrant. However, simply locating the United States and Europe at different points on a continuum between freedom and equality neglects the foundational similarities between these traditions. Important differences remain but the larger drama at work is one of convergence.

This convergence is being driven by a shared emphasis on law's role in advancing self-realization through individual expression. As such, law resists strong external moralities, ways of being and believing, that impede this end. Law aims not to cultivate shared moral goods, but to advance modernity's creative destruction. In many respects, this process has spurred the expansion of legal protections for religion, as law wipes away legal and cultural barriers to religious freedom. At the same time, it has undermined the logic of protecting religion-qua-religion and thus placed religious freedom on more tenuous foundations. Religion becomes indistinguishable from other forms of identity. As law treats religion as a subjective preference, the features of religious belief that require its protection become more difficult to articulate and defend.[54]

Defining religion in this way presents particular problems when religion comes into conflict with other forms of moral identity and expression. For instance, on what basis should courts resolve rights

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50 Eweida vs. United Kingdom, App. No. 48420/10, §106 (2013).

51 Eweida vs. United Kingdom, App. No. 48420/10, §109 (2013).

52 For a critical analysis of these decisions see, Mark Hill, "Lillian Ladele is the real loser in Christian discrimination rulings," *The Guardian* (January 17, 2013).

53 Martha Nussbaum, *The New Religious Intolerance* (Cambridge: Harvard University Press, 2012).

54 See, for example, Micah J. Schwartzman, "What If Religion is Not Special," *University of Chicago Law Review* 79 (2012): 1351-1427; Brian Leiter, *Why Tolerate Religion* (Princeton: Princeton University Press, 2012).

conflicts involving religious and sexual freedom, particularly when both are defined as integral to authentic self-realization? The most contested legal questions in religious freedom involve such conflicts, and the challenges are becoming more severe. For one, the consensus on religious accommodation is rapidly dissolving, as are the agreed upon circumstances under which exemptions should be established.[55] This situation reflects, in part, the more marginalized position of religion and religious belief in western societies. There has been a loss of shared cultural understanding about religion that places upon courts the burden of negotiating complicated conflicts between religious freedom and other rights claims. It is here that the limitations of the liberal approach to religious freedom are most apparent. Of course, it is important not to overstate the insolubility of these emerging tensions. As discussed above, American and European commitments to individual religious freedom remains strong and deeply grounded in law. But fault lines are appearing within both legal traditions.

Individual religious freedom also presents a useful perspective from which to assess the culture of western secularity. For one, these cases reveal the extent to which the secular lacks determined ideological content. Secular law and secular political space, as they have taken shape around individual religious freedom, are increasingly defined by the abnegation of meaning. The lack of an ideological secularism has opened space for individual religious freedom to flourish. However, this condition equally problematizes religious freedom, for it has resulted in a secular order suspicious of any claims of a robustly normative sort. This presents a challenge for religious beliefs that embody and advance strong forms of public moral meaning and, unsurprisingly, the most significant legal challenges for religious freedom now involve situations where religion contravenes other forms of liberal self-realization. Points of conflict arise when religious freedom seems to reject, either in symbol or substance, a radically decentered form of public morality. The European headscarf cases might therefore be understood on such terms, as might conflicts between religion and gay rights or contraception. These cases do not involve the judicial advancement of an anti-religious secularism so much as judicial resistance to thick forms of meaning that impinge upon the vacant moral terrain of the secular order.

From this vantage point, individual religious freedom stands in an increasingly vulnerable legal position, for there is a form of secular order taking shape ill-suited to its long-term flourishing. While the secular order of late western modernity does not define itself against religion, it nevertheless subtly erodes the foundations of religious freedom. In fact, this secular order embodies a certain contradiction with respect to religious freedom. It liberates individuals in a way that advances religious freedom but which equally limits the moral space afforded religion. The corrosive effects of these trends will reveal themselves further in the coming years.

III. Society: Institutional Religious Freedom

No issue has had a more significant role in recent law and religion debate than institutional religious liberty. The basic question involved is whether and when religious organizations (including but not limited to churches and other communities of worship) should be exempted from neutral laws of general applicability in order to preserve religious freedom rights. In addressing this issue, attention must be given not simply to religious freedom rights as such (i.e. the text of the First Amendment or Article 9) but to the structure of democratic constitutional order. As Richard Garnett observes, the ministerial exception raises "fundamental questions about church-state relations and the limits of

[55] See, for instance, Paul Horowitz, "Hobby Lobby is Only the Beginning," *The New York Times* (July 1, 2014); Douglas Laycock, "Religious Liberty and the Culture Wars," *University of Illinois Law Review* 3 (2014): 839-880.

government authority – questions at the core of the First Amendment's concerns."[56] The issue implicates "power and pluralism" in a more fundamental way than individual religious freedom.[57]

Debate in the United States has centered around the 2012 case *Hosanna-Tabor v. EEOC*. In this case, the Supreme Court unanimously endorsed the "ministerial exception" doctrine. *Hosanna-Tabor* concerned a lawsuit brought by Cheryl Perich, a teacher who had been fired from her teaching position at a school operated by a Lutheran church. Perich argued that her dismissal violated state and federal disability laws. The church, in turn, argued that such laws did not apply because of the "ministerial" nature of Perich's position. The Supreme Court was thus confronted with two questions. First, should U.S. law recognize the doctrine of the ministerial exception? Second, when is a position "ministerial" so as to warrant application of the exception?

With respect to the first matter, the Supreme Court unanimously endorsed the ministerial exception doctrine. The Court concluded that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." This conclusion was not only grounded in the constitutional text but also broader constitutional structure. As the Court emphasized, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so….interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." The church's right to freely practice its beliefs, coupled with the jurisdictional limits of the state to interfere therein, demand some measure of autonomy for religious organizations with respect to employment laws.

The second issue before the Supreme Court concerned the scope of the ministerial exception. It is one thing to conclude that employment discrimination law should not, for instance, compel the Roman Catholic Church to hire female priests. But who besides clergy should qualify as a "minister" for the purposes of the ministerial exception? While the lower court also recognized the ministerial exception, it concluded that Perich did not qualify as a minister under the doctrine. In considering Perich's situation, the Supreme Court gave particular attention to the fact that she was as a "called" as opposed to "lay" teacher. To become a called teacher, one had to undergo specific academic training and also be commissioned by the church congregation to serve in this capacity. In addition, Perich availed herself of various federal tax credits available to clergy, thus holding herself out as a matter of law as a minister. Finally, Perich taught religion classes and led students in devotional exercises, along with her core responsibilities teaching secular subjects. "In light of these considerations," the Court concluded, "Perich was a minister covered by the ministerial exception."[58] The decision thus affirmed the underlying principle that religious institutions require some measure of autonomy in order to exercise religious freedom. It also offered an account of qualifying ministers that includes persons other than clergy. How wide the doctrine's scope might be remains unsettled, as this decision linked the definition of minister tightly to the facts of the case.[59] Many unanswered questions remain in the wake of *Hosanna-Tabor*.

In discussing institutional religious freedom, it is important also to mention *Burwell v. Hobby Lobby*, one of the most intensely divisive cases in recent Supreme Court history. This case involved a dispute over the Affordable Care Act's requirement that employers provide free contraceptive coverage to female employees. By a 5-to-4 vote, the Court held that the mandate did not apply to closely held for-profit corporations with religiously-based objections to funding contraception. It is essential to note that this decision was based on the Court's interpretation of the Religious Freedom Restoration Act and was therefore a statutory rather than First Amendment constitutional judgment.

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56 Richard W. Garnett, "Hosanna-Tabor case to test our church-state divide," *USA Today* April 25, 2011).

57 Richard W. Garnett and John M. Robinson, "*Hosanna-Tabor*, Religious Freedom, and the Constitutional Structure," *Cato Supreme Court Review* (2011-2012): 308.

58 Hosanna-Tabor v. EEOC, 132 S.Ct. 694, 708 (2012).

59 Leslie C. Griffin, "Divining the Scope of the Ministerial Exception," *Human Rights Magazine* 39:2 (2013).

Still, by extending religious freedom protections to a for-profit corporation, the *Hobby Lobby* decision introduced new and complicated issues into the debate over institutional religious freedom.

Although different in fundamental ways, *Hosanna Tabor* and *Hobby Lobby* collectively demonstrate the extent to which the most significant issues in religious freedom in America are shifting from the individual to the institution. Second, they reveal profound lines of division over the purpose and expanse of religious freedom as it relates to other social and political values. The sources of this shift are manifold. The expanse of law is ever greater such that no aspect of a religious organization seems to escape government regulation.[60] Moreover, culture war issues such as abortion and gay rights show no sign of subsiding and, when coupled with a diminished consensus on accommodation, create new points of tension law must address. In this divisive environment, even the marketplace, which Paul Horowitz notes was "once seen as a place to put aside our culture wars," has become the site of conflict.[61] The debate between freedom and equality, playing out in the nation's churches, schools, hospitals, universities, and businesses, is not likely to abate.

The European Court of Human Rights has developed a somewhat different approach than the Supreme Court. Two decisions are particularly notable – *Obst v. Germany* and *Schüth v. Germany*. Both cases involved men fired from church employment for engaging in extra-marital affairs. Obst had been employed in various high-level positions within the Mormon church, while Schüth had been the organist and choirmaster in a Catholic church. The Court acknowledged in both cases a principle of religious autonomy, grounded in Article 9 of the Convention as read in light of Article 11 (freedom of assembly and association). However, the Court emphasized the need to balance this principle against countervailing legal considerations. The competing legal principle in these two cases was the Article 8 right to privacy and family life. Lower German courts had upheld the dismissals. The European Court in turn upheld the ruling in *Obst* but overturned it in *Schüth*.

The specific rulings in these two cases are less important than the jurisprudential methods employed. While the Court affirmed an account of religious autonomy that gave institutions certain legal space to operate outside of general employment laws, the scope of this right remains imprecise. The right of religious autonomy must, the Court emphasizes, be balanced against a host of other considerations and measured in light of particular situational facts. Thus, in assessing Obst's situation, the Court took note of the need for the church to maintain its credibility, the nature of the employee's position, and the injury Obst would suffer if terminated (e.g. he was relatively young and could find alternative employment). In the case of Schüth, by contrast, the Court emphasized that an organist and choirmaster did not fall within a class of persons who had to be fired for misconduct (unlike a high-ranking church official like Obst) in order for the religious institution to maintain its integrity. Moreover, Schüth did not abandon his rights to privacy and family life by accepting employment with the Catholic Church. The Court deemed Schüth's interests, both personal and professional, to be of greater weight in this instance than those of the church.

On one level, this mode of balancing mirrors what the Supreme Court did in *Hosanna-Tabor* when making judgments about whether Cheryl Perich qualified as a "minister." Yet the European Court's approach to religious autonomy, at least as exemplified in *Obst* and *Schüth*, was more hesitant and circumspect. What emerges from these two decisions is less a deep structural or jurisdictional principle, so much as a norm to be considered as one factor among many. In both cases, the Court examined whether German labor courts properly balanced the applicants' rights under Article 8 against

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60 As John Inazu observes, "We work, play, worship, and live in spaces regulated by government. Just look around the next time you step foot in your local church. Some of the building was probably subsidized through state and federal tax exemptions. Any recent construction likely encountered local zoning ordinances. The certificate of occupancy, fire code compliance, and any food service permits all reflect government regulation. Today, the government, its money, and its laws are everywhere." John Inazu, "Religious Freedom vs. LGBT Rights? It's More Complicated," *Christianity Today* (July 16, 2014).

61 Paul Horowitz, "Hobby Lobby is Only the Beginning," *The New York Times* (July 1, 2014).

the Convention rights of the Catholic and Mormon churches. By so doing, these decisions do not offer substantial guidance for determining when as a general matter the Article 9 right to institutional religious freedom will trump other factors.

The European Court had another opportunity to consider the matter of religious autonomy in *Siebenhaar v. Germany*.[62] In this case, a kindergarten teacher was fired from her position at a school operated by a Protestant parish because she was personally involved in another religious community. Siebenhaar's contract provided that she was to remain loyal to the sponsoring church and not be a member of any organization that advocated contrary views. The employer accordingly dismissed Siebenhaar upon learning that she had joined the Universal Church/Brotherhood of Humanity. This case placed Siebenhaar's Article 9 right to religious freedom against the church's right to religious autonomy, also grounded in Article 9 read in conjunction with Article 11 (freedom of assembly and association). In balancing these competing rights, the European Court upheld a German labor court's finding that Siebenhaar's Article 9 rights had not been violated. She should have been aware that her commitments to the Universal Church were incompatible with her employment in the Protestant Church. This case stands in the lineage of *Obst* and *Schüth* but differs from them in that it concerns the relationship between Article 9 and Article 11 as opposed to Article 9 and Article 8.

The approach taken in *Obst*, *Schüth*, and *Siebenhaar* made the European Court's subsequent decision in *Fernández Martinez v. Spain* all the more notable. The Chamber judgment in *Fernández Martinez* marked the Court's embrace of a stronger account of the religious autonomy principle. One commentator describes the *Fernández Martinez* decision as a "ministerial exception to the protection of individual human rights."[63] Fernández Martinez, a married Catholic priest, working as a teacher of Catholic morals in a public school, was relieved of his duties after a magazine article publicized his situation. Like Obst and Schüth, Fernández Martinez challenged his dismissal on grounds that it infringed upon his Article 8 right to privacy. As the Court notes, "The main question arising in the present case is thus whether the State was required, in the context of its positive obligations under Article 8, to uphold the applicant's right to respect for his private life against the Catholic Church's right to refuse to renew his contract."[64] In addressing this tension, the Court stressed that, "The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords." "Moreover," the Court added, "the principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty."[65] There are distinct considerations that must be taken into account when conflict involves "an employer whose ethos [is] based on religion or belief."[66]

In upholding the married priest's dismissal, the Court focused on the need to defend a space of relative autonomy for religious institutions. Unlike *Obst* and *Schüth*, which equally balanced religious autonomy against other considerations, the Chamber judgment in *Fernández Martinez* begins with a presumption in favor of religious autonomy. The principle must still be balanced against other considerations, but the decisions of religious institutions are to given deference because of the place such institutions maintain within the constitutional order.

This relatively strong account of religious autonomy in the Chamber judgment has been qualified in important ways. A recent Grand Chamber judgment upheld, by a close 9-8 vote, the Chamber's

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62 Siebenhaar v. Germany, App. No. 18136/02 (2011).

63 Stijn Smet, "Fernández Martínez v. Spain : Towards a 'Ministerial Exception' for Europe?" Strasbourg observers (May 24, 2012). Available at: http://strasbourgobservers.com/2012/05/24/fernandez-martinez-v-spain-towards-a-ministerial-exception-in-europe/

64 Fernández Martínez v. Spain, App. No. 56030/07, §79 (2012).

65 Fernández Martínez v. Spain, App. No. 56030/07, §80 (2012).

66 Fernández Martínez v. Spain, App. No. 56030/07, §87 (2012).

ruling but on far more circumscribed terms. The judgment affirms the basic principle of religious autonomy. In its most clear statement, the Court states that, "As regards the autonomy of faith groups…religious communities traditionally and universally exist in the form of organised structures. Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference."[67] Yet, the Court quickly follows this affirmation with a statement indicating such autonomy is far from absolute. "[A] mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life."[68] Absent from this analysis is any strong attention to the distinctive characteristics of religious organizations. They have rights as associations, but the extent to which this differs from the rights of non-religious associations is unclear. Most significantly, the Grand Chamber, while affirming a version of religious autonomy, pulls the jurisprudence back into line with the balancing approach of *Obst*, *Schüth*, and *Siebenhaar*.

There is no more important issue in law and religion today than institutional religious autonomy. It is particularly important for assessing the nature of secular order because it raises, in a way cases involving individual religious freedom do not, fundamental structural and jurisdictional considerations. This area of law is the source of growing contestation and will likely prove a more important site of law and religion debate than traditional religious freedom and religion-state relations questions. The growing involvement of law in matters of moral contest means there will be more occasions for law and religious institutions to collide.[69] The structure of religious freedom in the West will be greatly impacted by the outcome of these negotiations.

On one level, these recent cases are unremarkable. The underlying concept of the ministerial exception, for instance, rests on a straightforward recognition of the right religious communities maintain over the selection of clergy and religious leaders. It is not within the jurisdiction of the secular state to interfere with the internal governance of religious organizations. There are, of course, complicated legal questions involving what organizations should qualify for this protection. Should the exemption apply to only churches and other communities of worship or extend to religiously-affiliated organizations such as schools, hospitals, charities, and other non-profits? In addition, what employees within an organization are eligible for ministerial exemptions? The law will, over time, generate more guidance on these questions, and it might well be that American and European law adopt different approaches.

On the other hand, the increasing centrality of institutions to law and religion debate needs to be understood as reflecting deep and changing dynamics within western society. It is particularly worth considering why these cases have emerged with such intensity? The cases can, of course, be viewed as conflicts arising out of the growing web of state regulations and the loss of cultural consensus. There is an important insight here, as discussed above. But this should not be the primary lens through which institutional religious freedom is examined. Rather, these legal conflicts reflect a more elemental struggle to define moral meaning in late modern society. In particular, religious institutions present a determined challenge to the atomizing and detraditionalizing tendencies of the liberal secular order. From this perspective, institutional disputes raise different questions from those in the individual context, a fact that is lost when the institutional and individual cases are viewed as mere analogues.

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67 Fernández Martínez v. Spain, App. No. 56030/07, §127 (2014).

68 Fernández Martínez v. Spain, App. No. 56030/07, §132 (2014).

69 The debates are not narrowly about sexual orientation, though this is likely to be one of the main sources of conflict in the United States and elsewhere. As Ross Douthat notes, this issue brings together "postsexual revolution liberalism" and the "official beliefs of every traditional religious body, be it Mormon or Muslim, Eastern Orthodox or Orthodox Jewish, Calvinist or Catholic." Ross Douthat, "A Company Liberals Could Love," *The New York Times* (July 5, 2014).

Religious institutions are the primary bearers of moral tradition and practice. In this respect, they are something of an anomaly within a flattened secular order divested of deep moral meaning. Indeed, they might be seen to embody a distinctive threat to the secular order. Of course, this need not necessarily be the case. Religious institutions might be seen simply as vehicles through which individuals pursue the sort of self-fulfillment it was argued the law of individual religious liberty is encouraging. Yet, religious institutions are more than aggregations of individuals. They embody strong normative accounts of the world, precisely the sort of beliefs that are anathema to the late modern secular order. It is unsurprising, in light of this, that institutions have become the central battleground in law and religion disputes.

Given this state of affairs, recent decisions recognizing the principle of religious autonomy are somewhat puzzling. One on level, these cases resist the advancement of a morally desiccated modernity, for the recognition of institutional religious freedom facilitates the sustentation and projection of strong moral identity into secular public life. Religious institutions mitigate against the liberal impulse to collapse space between the individual and the state.

At the same time, significant questions remain about the depth and durability of recent case law in this area. While both the Supreme Court and European Court of Human Rights have affirmed the principle of religious autonomy, significant crosswinds are poised to challenge the logic on which these decisions rest. One factor is that that the idea of religious autonomy, as it has found root in western law, rests on rather thin foundations. While the principle of religious autonomy necessarily entails a jurisdictional understanding of the relationship between the state and religious institutions, the deeper structural logic that might animate religious autonomy is lacking. There is no underlying account of freedom of the church. There is no ontological account of social spheres that might sustain a disaggregated social order.[70] There is no room for such arguments in the secular social order of modernity. Law invokes the category of religious autonomy but without a grounding in deeper foundational resources. As with religious symbols, discussed below, this reveals the ways in which modernity maintains the shell of inherited concepts while abandoning much of the content.[71]

Law can still do significant work in this area. However, rooting religious autonomy in a liberal logic renders it susceptible to long-term erosion. Protecting religious autonomy so as to grant groups space to define their own form of moral order protects the very sorts of communities that are problematic within the modern secular order. The law will not long tolerate this contradiction and will move to circumscribe the scope of autonomy. The principle will endure but with a radically delimited scope.

IV. State: Religious Symbols

No issue goes more directly to the meaning of the secular than the state's support for religious beliefs and activities. The issue of religion-state relations encompasses a plethora of issues including religious establishment, funding of religious activities (e.g. education or social services), and the subsidization of religious organizations through tax policy. Yet, the issue that most frequently invites contestation is state sponsorship of religious symbols and speech. It is, Joseph Weiler writes, the "debate that won't go away."[72] Not only won't the issue go away, but it generates impassioned and often outsized attention. In the end, debates about religious symbols are less about symbols than how the political

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[70] For an argument against strong accounts of religious institutionalism, particularly ontological and jurisdictional accounts of freedom of the church, see, Richard Schragger and Micah Schwartzman, "Against Religious Institutionalism," *Virginia Law Review* 99:5 (September 2013): 917-985. For a counterargument see, Paul Horowitz, "Defending (Religious) Institutionalism," *Virginia Law Review* 99:5 (September 2013): 1049-1063.

[71] Steven D. Smith, *The Rise and Decline of American Religious Freedom* (Cambridge: Harvard University Press, 2014): 7.

[72] Joseph Weiler, "State and Nation; Church, Mosque and Synagogue—the Trailer," *International Journal of Constitutional Law* 8 (2010): 162-163.

community defines its relationship to religion.[73] As such, legal debates over religious symbols offer a window into the ways law reflects and shapes the idea of the secular.

Symbolic civil religion has long been part of American political identity. The placement of "In God We Trust" on currency, the depiction of religious figures on the frieze of the Supreme Court, and the maintenance of congressional chaplains, all testify to the deep connections between religion and American democratic life. These sorts of practices have long been subject to critique and legal challenge and, as the United States becomes more secular and pluralistic, such challenges will only increase.

If U.S. case law has broadly protected individual and institutional religious freedom, cases involving religious symbols have been more varied in their outcomes.[74] Yet while the case law remains variegated, recent cases reveal certain impulses that are shaping the jurisprudence and which offer a useful position from which to interrogate legal conceptions of the secular.

Two of the more important recent religious symbols cases – *Van Orden v. Perry* and *McCreary Co. v. ACLU* – involved public displays of the Ten Commandments.[75] In its 2005 decision in *Van Orden v. Perry*, the Supreme Court held that a Ten Commandments display on the grounds near the Texas State Capitol did not violate the Establishment Clause. The decision in *Van Orden* is interesting because the majority opinion begins by proposing that, "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[76] The Court, in other words, does not demand the complete absence of religious symbols from secular public space. However, determining whether any given religious display is constitutionally permissible demands a fact-intensive and context-dependent analysis. In this instance, the Court's majority gave significant attention to the monument's recognition of "the role of God in our Nation's heritage."[77] Along similar lines, the Court argues that, "Our institutions presuppose a Supreme Being," an interesting statement that is both a historical claim and also, perhaps, a normative proposition. These twin considerations are held to justify the monument's memorialization of the important role religion has maintained in American law and culture.

While history offered some warrant for the religious displays, the Court also assessed the monument in light of its character and context. In so doing, the Court gave particular attention to the fact that the display is "passive" in nature, by which it seems to mean that its religious meaning is muted.[78] In other words, the monument does not project a narrowly religious message. The Court partly bases this claim on the fact that the Ten Commandments monument was only one of many historical markers in the display. Given its location in a park with numerous other secular monuments, the Court concludes that someone observing the Ten Commandments display would not understand it as advancing sectarian theological propositions.

Following a similar mode of analysis, the Court deemed another Ten Commandments monument unconstitutional in *McCreary County v. ACLU*. At issue in this case was a monument located inside a

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73 John Witte emphasizes that while "[i]t's easy to be cynical" about cases involving religious symbols, they "are essential forums to work through our deep cultural differences and to sort out peaceably which traditions and practices should continue and which should change." John Witte, Jr., "Life High the Cross," *Huffington Post* (March 27, 2011). Available at: http://www.huffingtonpost.com/john-witte-jr/lift-high-the-cross-lauts_b_840790.html.

74 In a series of Establishment Clauses cases ranging across several decades, the Supreme Court enacted a strong separationist approach to religion-state relations. This trend has been rejected in a number of important respects. See Witte, "The Study of Law and Religion in the United States," 338-339.

75 Vincent Phillip Muno, "Thou Shalt Not Post the Ten Commandments? *McCreary County*, *Van Orden*, and the Future of Religious Display Cases," *Texas Review of Law and Politics* 10:2 (2006): 359-400.

76 Van Orden v. Perry, 545 U.S. 677, 690 (2005).

77 Van Orden v. Perry, 545 U.S. 677, 687 (2005).

78 Van Orden v. Perry, 545 U.S. 677, 682 (2005).

Kentucky courthouse. In assessing the constitutionality of this display, the majority asked two central questions. First, was there a secular purpose in the government's action? Second, does the monument have "the ostensible and predominant purpose of advancing religion"?[79] With respect to the first question, the Court argued that the monument could not be interpreted as advancing a secular end. The Court held that "the insistence of the religious message is hard to avoid."[80] Unlike the monument in *Van Oden*, this monument was such that a "reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message."[81] The Court went on to conclude that, "When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable."[82]

In important respects, the dissenting opinion in *McCreary* is more interesting for our purposes. Justice Scalia, writing for the dissent, criticizes the majority for "appealing to the demonstrably false principle that government cannot favor religion over irreligion."[83] The majority opinion, he argues, "suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another. This is indeed a valid principle where public aid or assistance to religion is concerned, or where free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public form at all."[84] This position not only rejects the secular purpose test. It also rejects the idea that the state must be neutral with respect to matters of religion.

Prayer in legislative settings has raised similar issues. The foundational decision in this area came in the 1983 case *Marsh v. Chambers*. In this case, the Supreme Court upheld the Nebraska Legislature's practice of opening each legislative day with prayer led by a chaplain paid by the state. Several aspects of this ruling are worth noting. For one, the Court emphasized that, "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." While historical practice alone is not dispositive, it "sheds light…on what the draftsmen intended the Establishment Clause to mean." [85] The Court also concluded that neither the long tenure of the chaplain nor the fact that he was paid from public funds made the practice unconstitutional. Most significantly, the Court emphasized that, "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance one, or to disparage any other, faith or belief."[86] The holding in *Marsh* thus not only affirmed Nebraska's practice but granted wide latitude for other governmental bodies to engage in legislative prayer.

The Supreme Court recently returned to this issue in *Town of Greece v. Galloway*. The town of Greece, New York has since 1999 opened town meetings with a prayer delivered by local clergy. The overwhelming majority of these prayers were offered by Christian clergy, though the town never acted to exclude any particular clergyperson. The facts of this case notably differed from *Marsh* in that the prayer-givers were not paid by the government but were rather volunteers from the community. In this respect, counsel for the town emphasized at oral argument that "we believe this case is actually an easier case than Marsh because in Marsh, there was a paid chaplain from the same denomination for

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79 McCreary County v. ACLU, 545 U.S. 844, 860 (2005).

80 McCreary County v. ACLU, 545 U.S. 844, 868 (2005).

81 McCreary County v. ACLU, 545 U.S. 844, 869 (2005).

82 McCreary County v. ACLU, 545 U.S. 844, 869 (2005).

83 McCreary County v. ACLU, 545 U.S. 844, 893 (2005).

84 McCreary County v. ACLU, 545 U.S. 844, 893 (2005).

85 Marsh v. Chambers, 463 U.S. 783, 790 (1983).

86 Marsh v. Chambers, 463 U.S. 783, 795 (1983).

16 years."[87] On the other hand, the prayers at issue in *Marsh* were "nonsectarian," whereas those at issue in *Town of Greece* were explicitly Christian.

In a 5-4 decision, the Supreme Court upheld the town's practice of legislative prayer. It is notable that all nine justices followed *Marsh* in accepting that some forms of legislative prayer were constitutionally permissible. They differed, however, in their understanding of what form such prayers must take. The majority accepted the constitutionality of expressly sectarian prayers, including prayers that overwhelming came from one religious tradition, so long as the legislature did not engage in proselytism. The dissent, by contrast, argued that legislative prayers must either be framed in nonsectarian terms or, alternatively, that the government must actively invite clergy from diverse traditions.

Mention should be given to the Court's extensive discussion of coercion. In addressing whether the town of Greece was coercing citizens, Justice Kenney wrote for the majority that, "On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance."[88] The Court added "that the reasonable observer is acquainted with this tradition [of public prayer] and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews."[89] This conclusion is notable in that the Court does not define theological speech as inherently coercive. Unlike the Ten Commandments cases, the Court in *Town of Greece* did not move to interpret the prayers as acts of mere historical or cultural memorialization. They were constitutionally permissible as living and theologically particularistic expressions. There are significant differences between legislative prayer and religious monuments that allow the Court to make this judgment, but it speaks all the same to the deep and ongoing ways in which American public life is tethered to religious forms of meaning.

No recent case before European Court of Human Rights has occasioned more controversy than *Lautsi v. Italy*, which involved a challenge to the practice of hanging crucifixes in public school classrooms. The mother of two schoolchildren claimed this practice violated her Article 9 right to religious freedom, in this instance the right to raise her children in accord with her atheistic beliefs. More than any other European Court case addressed in this paper, *Lautsi* acquired significance far beyond the technical legal issues at stake. It became a referendum on the fundamental orientation of Italian and European culture towards Christianity. The legal debate was thus obscured by the accompanying political debate that framed the case as a battle between religion and secularism.[90]

In the initial opinion, a 2009 Chamber judgment, the Court noted that the state had justified the display of crucifixes "by referring to the positive moral message of Christian faith, which transcended secular constitutional values, to the role of religion in Italian history and to the deep roots of religion in the country's tradition."[91] The government's argument, in other words, was that the crucifix was not a religious symbol but a symbol that conveyed a "neutral and secular meaning."[92] The Chamber rejected this claim and held that the crucifix primarily conveyed a message associated with Roman

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87 Transcript of Oral Argument at 6, Town of Greece v. Marsh, 134 S. Ct. 1811 (No. 12-696).

88 Town of Greece v. Galloway, 188 L. Ed. 2d 835, 841 (2014).

89 Town of Greece v. Galloway, 188 L. Ed. 2d 835, 853 (2014).

90 Jeroen Temperman goes so far as to propose that "the third party interveners, the Government of Italy and some of the concurring Judges, rather went out of their way to create a picture of the case showing that what we are dealing with is not even a real human rights case – what we are dealing with, surely, is but a militant atheist looking for a game of rough-and-tumble, abusing her so-called rights in the process." Jeroen Temperman, "Religious Symbols in the Public School Classroom," in *The Lautsi Papers*, ed. J. Temperman (Leiden: Matrinus Nijhoff, 2012): 172.

91 Lautsi v. Italy, App. 30814/06, §51 (2009).

92 Lautsi v. Italy, App. 30814/06, §51 (2009).

Catholic Christianity. The Court notes, for instance, that it is "impossible not to notice crucifixes in the classroom," and that students will perceive them to be "an integral part of the school environment."[93] As such, "the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion."[94] The Court argues that this would be "emotionally disturbing" to some students, especially religious minorities.[95] In light of such considerations, the Court concludes that, "The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought."[96]

This Chamber judgment was overturned in a 2011 Grand Chamber ruling. The arguments advanced in defense of the crucifix are particularly significant. For one, the claim was made that the Chamber judgment wrongly conflated neutrality and secularism, framing neutrality as "excluding any relations between the State and a particular religion."[97] This is a strong claim that portrays the language of neutrality as cover for smuggling a more determined secularism into law. It represents a plausible reading of the Chamber's opinion. As one commentator observed, the Chamber judgment endorsed "a strong duty of state neutrality-through-separatism that cannot be found in the Convention text. It is hard to avoid the conclusion that the ideal pattern of state-religion relations that the Court appears to have in mind is a secular state."[98] Other commentators have similarly pointed out how Chamber judgment seems to privilege a strict separation of church and state.[99]

Another line of argument, similar to that advanced before the Chamber tribunal, was that the cross "could be perceived not only as a religious symbol, but also a cultural and identity-linked symbol, the symbol of the principles and values which formed the basis of democracy and western civilisation."[100] Along these lines, the claim was made that the crucifix was a mere "passive symbol" that carried no theological significance.[101] It symbolized common values rooted in history and culture and thus served to unite Italians rather than marginalize non-Catholics.[102] Shorn of religion, the cross became a historical marker that should cause no offense to persons or the law.

While the Grand Chamber decision preserved space for the recognition of Christianity's role in Italian culture, the Court refused to frame its opinion in a way that would permit the deeper integration of Christianity into European identity and self-understanding. Indeed, the decision emphasized the extent to which the crucifix was drained of any living religious significance.[103] In so doing, the Court sought to avoid rendering a decision that could be interpreted as endorsing either a secularist or Christian account of the state. The decision distanced itself from the neutrality-as-secularism approach of the Chamber judgment, but redefining religious symbols as cultural artifacts only introduces new questions and challenges.

Cases involving religious symbols have generated enthusiasms unmatched in other areas of law and religion. The immense global attention given *Lautsi* is only the most recent example. Interest in these

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93 Lautsi v. Italy, App. 30814/06, §54 (2009).

94 Lautsi v. Italy, App. 30814/06, §55 (2009).

95 Lautsi v. Italy, App. 30814/06, §55 (2009).

96 Lautsi v. Italy, App. 30814/06, §56 (2009).

97 Lautsi v. Italy, App. 30814/06, §35 (2011).

98 Ian Leigh, "New Trends in Religious Liberty," *Ecclesiastical Law Journal* 12 (2010): 272.

99 Christian Walter, "Lautsi v. Italy: Introductory Note," *International Legal Materials* 49:1 (2010): 33.

100 Lautsi v. Italy, App. 30814/06, §36 (2011).

101 Lautsi v. Italy, App. 30814/06, §36 (2011).

102 Lautsi v. Italy, App. 30814/06, §36 (2011).

103 For commentary on this argument, see Stanley Fish, "Crucifixes and Diversity: The Odd Couple" *The New York Times* (March 28, 2011).

cases reflects the manner in which they have become a referendum on the state's religious and moral identity. The jurisprudence is accordingly subsumed into a larger struggle to achieve a legal imprimatur for either a secularist or religious cultural narrative.

While tempting to minimize the significance of symbols cases, it is important to recognize the deeper issues they raise. As Thomas Berg emphasizes in discussing the Ten Commandments cases, "Symbols matter."[104] At issue in religious symbols cases is a foundational struggle to name and cultivate public meaning within secular society. Even more, these legal debates offer a window into the status of secular meaning and the ongoing negotiation between forms of religious and secular identity. However insignificant some of the legal issues appear at first glance, the struggle over religious symbols goes to the heart of modernity's internal tensions and anxieties.

Viewed from this broader perspective, the debate about religious symbols directly implicates the secular and secular meaning. In fact, these cases allow for a more unmediated consideration of the secular than other law and religion issues. In particular, symbols raise the question of whether and on what terms religious meaning can maintain a role within the secular state. In what sense is it coherent to view the secular state through the lens of religious meaning? Are symbols ways of validating secular ideals or defensive attempts to resist modernity?[105] At particular issue is how law and politics can even be vested with deep meaning, especially of a religious nature, when the impulse within modernity is to shed such meaning?

The Supreme Court and European Court of Human Rights have both permitted certain public religious displays, so long as the display is drained of strong and particularistic religious meaning. Of particular note is the conceptual and linguistic convergence the two courts have displayed in talking about passive versus active symbols. There remain some important differences. The Supreme Court, for instance, has exhibited a greater willingness, particularly among some Justices, to affirm religious symbols on the grounds that they testify to ongoing linkages between American democratic culture and religion. *Town of Greece* went even further by permitting the almost direct sacralization of legislative activity through sectarian prayer. By contrast, the conclusion of *Lautsi* is that the crucifix, while undeniably a religious symbol, is best understood as a cultural icon representing Italian history and the Italian state. These differences, however, are ultimately more a matter of tone than substance. That there remains greater space within U.S. law for recognizing forms of symbolic religiosity should not shroud the ongoing jurisprudential convergence. In both the United States and Europe, there is a general openness to religious symbols as long as they do not impose a determined theological narrative onto secular law and politics.

It is plausible to view this approach to religious symbols as a mere via media between secularism and religious politics. To some extent this is certainly the case, but there is also a more fundamental dynamic at work. The jurisprudence of religious symbols reflects the outworking of a shared logic, grounded in the experience of political modernity, that is reconstructing the role of religion within the secular order. Two features of this process are particularly worth noting. First, case law has increasingly drained religious symbols of religious meaning. Religious symbols are viewed with critical suspicion insofar as they contradict modernity's separation of law and religion. While courts have permitted a role for symbols in public life, these symbols are denied any onto-theological significance. At the same time, however, the contest over symbols continues unabated, as do efforts to define these symbols as a proxy for participation in a transcendent moral order. Echoes of the sacred remain, even if in a desiccated and hollow form. Debate about religious symbols reveals the trajectory of the secular, as well as its contested realization. The secularization process remains incomplete

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[104] Thomas C. Berg, "Religious Displays and the Voluntary Approach to church and State," *Oklahoma Law Review* 63:47 (2010): 66. See also, Thomas C. Berg, "Can State-Sponsored Religious Symbols Promote Religious Liberty?" *Journal of Catholic Legal Studies* 52:23 (2013): 23-48.

[105] Zachary R. Calo, "Higher Law Secularism: Religious Symbols, Contested Secularisms, and the Limits of the Establishment Clause," *Chicago-Kent Law Review* 87:3 (2012): 811-831.

What is revealed in these cases is the transformation of secular meaning, although not the thoroughgoing secularization of politics. Connections between legal and religious meaning have been decidedly loosened, but not severed. The question moving forward is whether the current legal situation simply reflects a halfway house on the road to a more thoroughgoing secularization or a stable and permanent form of secular order. There are certainly pressures to push symbolic religiosity further outside of law. The creation of a secular order denuded of deep moral meaning demands as much. Yet the outworking of this process is slow. In a way not captured by case law on religious freedom, the symbols debate discloses a secular order haunted by anxiety and unable to fully accept a foundationless politics. There is a residual yearning to keep the secular in touch with a transcendent order. This yearning cannot be satisfied within the boundaries of modernity, resulting in historicized religious symbols divested of their meaning and placed in the service of the state. Religious symbols become an ossified representation of ideals that cannot be sustained. Yet the tension endures and will continue to endure.

V. Conclusion: Law between Secular and Post-Secular

There is no single thread uniting American and European law and religion jurisprudence across the various issues discussed. There are common themes, to be sure, but also points of tension and conflict. There are trends advancing protections for religious freedom, just as there are trends placing religion in a more tenuous legal position. In the end, this jurisprudence is defined by internal diversity and, at times, a structural incoherence. Yet, while there is no principle that can fully explain the outworking of these legal decisions, law and religion jurisprudence collectively provides insights into the structure of western secular order.

For one, law and religion jurisprudence reveals the crisis afflicting western secular culture. There is much talk about a crisis of the secular. As applied to law, talk of crisis generally refers to a perceived disruption of the western achievement of secular law. For some, it is the failure of secular law to contain religion.[106] For others, it is the failure of religion to narrate legal meaning.[107] Particulars aside, debate about law and the secular crisis tends to unfold on binary terms, emphasizing a conflict between religion and secularism over the authentic meaning of the secular order. In this zero sum game, every gain for religion comes at the expense of secularism and vice-versa. This is a well-established framework for exploring the western situation. As Silvio Ferrari observes, "For a long time the question of the place and role of religion in the public sphere has been addressed through a binary model, contrasting the secular and the religious."[108] There no doubt are ways in which the legal situation is properly understood as a "clash of universalisms."[109] But this is far from the main challenge.

The real crisis is not that law has become the site of a pitched battle between secular and religious commitments. To the contrary, case law from the United States and Europe reveals a secular order stripped of thick normative meaning. Residual cultural forms vest law with the patina of meaning, but the doctrine is largely hallow. The secular order is defined more by absence than content, with the deeper moral logic that undergirds the western secular order increasingly at its jurisprudential end. In this respect, law and religion jurisprudence reveals the shape of the secular after the exhaustion of

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[106] Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford: Oxford University Press, 2012).

[107] Joseph H.H. Weiler, "A Christian Europe? Europe and Christianity: rules of commitment," *European View* 6 (2007): 143-150.

[108] Ferrari, "Law and Religion in a Secular World: A European Perspective," 356.

[109] Abdulaziz Sachedina, "The Clash of Universalisms: Religious and Secular in Human Rights," *The Hedgehog Review* 9:3 (2007): 49-62.

western cultural capital. The main concern then is not the shifting axis between secularism and religion. It is viability of the secular itself.

What defines this post-ideological secular order is the legal construction of space within which persons and communities (as aggregations of persons) engage in moral meaning-making and self-fulfillment. The unfolding drama of law and religion in the West most basically concerns the jurisprudential advancement and maintenance of this secular regime. Shorn of moral density, law in the late modern secular order invites persons to devise their own narratives in a world without a story.[110] The result is a double-edged sword for religion. On one hand, law's retrenchment from advancing determined meaning opens space for religion to flourish, even in cultural contexts where religion is marginalized. At the same time, the disembedding of law from a larger normative framework leaves religion in a vulnerable position. Religion comes to be defined as preference indistinct from any other preference and thus not deserving of special status within law.[111]

While law and religion jurisprudence reveals the exhaustion of liberalism as a moral tradition, it would be inapposite to describe this tradition as void of normative content. The secular order to which it gives rise still embodies determined value commitments. In particular, law binds religion within a limit principle, and it is at this boundary that the most intense conflicts occur. In a paradoxical way, it is the emptying of law's normative content that generates the boundary. Law creates space for religion by divesting itself of dense meaning. Yet, the resultant secular order resists moralities that are strong, determined, and threatening to the void.[112] The secular order that frees religion thus also pushes back against religion when it interferes with other moralities and other forms of self-realization.[113]

The creation of this secular order has been uneven, but there are common dynamics pushing U.S. and European jurisprudence in similar directions. There remain differences, to be sure, some of them significant. Yet individual cases, and even areas of law, are less significant than the deeper structural logic at work within law. Beneath the particular doctrines developed by these two courts is a shared accounting of religion, secularity, and moral order in the late modern the West. These legal systems will increasingly be defined by their similarities more than their differences.

Such an interpretation runs contrary to the narrative that often frames comparative studies of American and European law and religion. There remain strong strands of exceptionalism that see American law as more protective of religion and religious freedom than its European counterpart. For instance, an editorial in a British newspaper following *Eweida* emphasized the fact that American commentators thought such a ruling could never happen in the U.S. "with its more robust tradition of

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110 Robert Jensen, "How the World Lost Its Story," *First Things* (October 1993). See also, Brad Gregory, *The Unintended Reformation* (Cambridge: Harvard University Press, 2012).

111 Speaking of the American situation, Steven Smith has argued that, "One effect of the modern Court's elevation of public secularism to the status of hard constitutional law is that the classic rationales for religious freedom, because they were and are theological in nature, are thought by many theorists and jurists to be inadmissible for purposes of public justification. Secular substitutes are proposes, but these are of doubtful efficacy. Interestingly, therefore, theorists gravitate to the conclusion that there is no justification for giving special protection to religious freedom." Smith, *The Rise and Decline of American Religious Freedom*, 11.

112 Nehal Bhuta, "Two Concepts of Religious Freedom in the European Court of Human Rights," EUI Workin Paper LAW 2012/33.

113 As one commentator notes, "Religious objections to gay marriage are increasingly seen as out of the mainstream, as outlandish as the speech and activities of dissenters who liberals used to believe needed protection. So it is natural for religious people to argue that they deserve constitutional protection as well, and that for their sake, laws that promote contraceptives, gay marriage, and the like must be narrowed or eliminated. A side effect of this trend is that cases increasingly involve a conflict between two different rights, or conception of rights, rather than a conflict between a right and a government interest." Eric Posner, "Religious people have rights, too – and that's why Hobby Lobby threatens liberals," available at www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_hobby_lobby_is_a_bore.html

respect for religious freedom."[114] Other commentators, remarking on Islam's fuller integration into American society, have emphasized how "the European Enlightenment sought to protect the state from religion, whereas the American settlement aimed to protect religion from the state."[115] These analyses shine light on important truths, but neglect deeper similarities between the American and European approaches to religion. In both the U.S. and Europe, law reveals the emergence of a common form of secular order along with an attendant approach to religion.

What is the place of religion within this shared secular order? Both American and European law advance open and constructive relationships with religion. Both legal systems provide meaningful and, in certain respects expanding, protections for religious freedom, both individually and collectively. Both legal systems maintain space for religion to shape political and cultural meaning symbolically and expressively. Religion and religious freedom are hardly under assault. Secular politics in the West has redefined the relationship between law and religion, but has not produced a legal secularism defined against religion.

At the same time, the secular presents real challenges for religion, and these challenges are growing. The main problem is that secular order in its regnant form cannot sustain a coherent account of the role of religion within law, politics, and culture. This deficit moreover is rooted in the very character of liberal modernity. The main challenge is that, as Patrick Deneen argues, "the liberal experiment contradicts itself, and a liberal society will inevitably become 'postliberal.'"[116] More than simply contradicting itself, liberalism actively undermines itself. The impulse within liberalism is to destroy inherited traditions, religion foremost among them, that imbue liberal order with moral thickness and that sustain it as an ongoing moral tradition. Space will remain for religion, and it will no doubt be given serious regard in law, but it will at the same time become ever more marginal. Religion will take the form of a preference and private activity that is limited in how it can carve moral meaning into the public.

This process will take time to fully work itself out. It will be slow and hesitant and uneven. It will unfold at a different pace in the United States and Europe. But it is a process well underway, even if the full drama is not yet manifest. We are now in medias res, and the legal situation projects a certain settledness. But undercurrents of deep change remain at work within law in ways subtle and pronounced. Law continues to shape secular order just as secular order continues to shape law.

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[114] Linda Woodhead, "Religious freedom in Europe – when both sides go too far," *The Guardian* (November 7, 2012).

[115] Philip Blond and Adrian Pabst, "Integrating Islam into the West," *The New York Times* (November 4, 2008).

[116] Patrick Deneen, "Unsustainable Liberalism," *First Things* (August/September 2012)

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