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Can Constitutionalism, Secularism and Religion Be Reconciled in an Era of Globalization and Religious Revival?

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INTRODUCTION:
CAN CONSTITUTIONALISM, SECULARISM AND RELIGION BE RECONCILED IN AN ERA OF GLOBALIZATION AND RELIGIOUS REVIVAL?

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I.   THE PARAMETERS OF THE CONTEMPORARY PREDICAMENT

Distilled to its core, modern constitutionalism is the necessary byproduct of the Enlightenment and, above all, of the latter's essential grounding in a secular vision. In a nutshell, the essential tenets that animate the Enlightenment project are threefold: the radical separation between the realm of Faith and that of Reason; entrusting the ruling of the public sphere exclusively to the dictates of the realm of Reason; and the promotion of liberty and equality for all. If to this we add that the Enlightenment originally stood against an unraveling feudal order mired in clashes between Faith and Reason and in manifold fratricidal wars among adherents to rival religions, then the place of religion in the secular polity becomes abundantly clear. Religion should be expelled from the public sphere, but consistent will the equal liberty of all, all religions with adherents within the polity should enjoy equal protection within the private sphere. Moreover, from a constitutional standpoint, the modern state steeped in the normative order dictated by the Enlightenment should at once be both neutral with respect to religion, by neither favoring it nor disfavoring it within its (public) sphere of legitimate action, and also equally protective of its citizens' freedom *of* and *from* religion within the private sphere. This dual constitutional prescription is neatly encapsulated in the Religion Clauses found in the First Amendment to the United States Constitution: The "Establishment Clause" prohibits the state from adopting, preferring or endorsing a religion, whereas the "Free Exercise Clause" enjoins the state from interfering with the religious freedom of its citizens.[1] Consistent with the Enlightenment's secularist ideal, there ought to be a "wall of

    [1] U.S. CONST. amend. I.

separation" between church and state,[2] combined with a complete lack of interference by the state with freedom of religion within the private sphere.[3] In short, ideally, the public sphere should be neither religious nor antireligious, but *areligious*. The private sphere, on the other hand, should preserve peaceful coexistence among all the diverse religious ideologies that dwell within its precincts.

It is obvious that there is a wide gap between Enlightenment ideals and how the Enlightenment project has actually fared since its launch in the wake of the 1787 United States Constitution and the 1789 French Revolution. To take but one example, equality between men and women is clearly prescribed by the Enlightenment ideal, yet women did not obtain the right to vote till 1920 in the United States[4] and till 1944 in France.[5] It is, accordingly, hardly surprising that contemporary constitutional jurisprudence regarding the relationship between religion and the state should deviate in various degrees from the Enlightenment ideal outlined above. The key question for our purposes, however, is whether there are any plausible scenarios under which a working constitutional jurisprudence may reasonably approximate that Enlightenment ideal.

At present, the prospects of such an approximation seem rather dim, and if anything, significantly less likely than they might have been a generation ago. Indeed, there has been both an intensification of religion through the spread of "strong" religion[6] and the deployment of several different fundamentalist religions, ranging from Protestant fundamentalism in United States[7] to Islamic fundamentalism with a

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2 *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

3 The actual meaning and implication of the U.S. Religion Clauses have been subject to much controversy and debate throughout the past two centuries. *See, e.g.*, Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) (discussing the many problems posed in the quest for a proper balance between the two Religion Clauses); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323 (discussing numerous shifts in the U.S. Supreme Court's interpretation of the Religion Clauses). My aim here, however, is not to account for American constitutional jurisprudence as it pertains to the Religion Clauses, but rather to consider the latter in the light of the Enlightenment's secularist ideal.

4 *See* U.S. CONST. amend XIX.

5 *See* Ordinance of the French Provisional Government, Assembleé Nationale, "La citoyenneté politique des Femmes," of Apr. 21, 1944, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 22, 1944, *available at* http://www.assemblee.nationale .fr/historie/femmes/citoyennete_politique_de-Gaulle.asp. Some feminists have argued that the Enlightenment *even in theory* promotes a fraternity among men, which excludes women from power, thus making genuine equality for women structurally impossible. *See generally* CAROLE PATEMAN, THE SEXUAL CONTRACT (1988). The issues raised by this feminist claim remain beyond the scope of this Introduction.

6 *See* András Sajó, *Constitutionalism and Secularism: The Need for Public Reason*, 30 CARDOZO L. REV. 2401 (2009).

7 *See* JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 3 (1994).

global aspirations.[8]   Moreover, since the 1980's, there has been a "deprivatization" of religion[9] that involves two interrelated processes: the "repoliticization of the private religious and moral sphere"; and the "renormativization of the public economic and political spheres."[10]

Concurrently with this religious revival, there has been, on the philosophical plane, a radical post-modern attack on one of the Enlightenment's key tenets, namely the clear separation between the realm of Reason and that of Faith.[11] Briefly stated, the post-modern challenge builds on the "disenchantment of reason" associated with the perception that Reason as the means to the implantation of a universally justified rational order gives way to purely instrumental reason—*i.e.*, a use of reason and of scientific methodology for purposes of advancing the narrow interests of the powerful, fostering colonialism and neo-colonialism, exacerbating disparities in wealth, etc.[12] The reduction of reason to instrumental reason turns the means of the Enlightenment against its ends, and particularly against the pursuit of liberty and equality for all.

As the spread of instrumental reason tends to become all pervasive, alienated social actors are prone to retreating to individualist isolation in futile opposition to an increasingly oppressive and meaningless social reality.[13] From the standpoint of conceptions of the good and of their pursuit, modernism anchored in Reason and Enlightenment values gives way progressively to a fragmentation of competing post-modern visions fueled by the subjectivism engendered by disenchanted individualist isolation.[14] In this postmodern setting, all competing discourses and all competing conceptions of the good emerge as ultimately purely subjective and as equivalent, thus negating any priority or particular legitimacy to secularism, modernism, reason or Enlightenment values.[15]

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[8] *See* Michel Rosenfeld, *Derrida's Ethical Turn and America: Looking Back from the Crossroads of Global Terrorism and the Enlightenment*, 27 CARDOZO L. REV. 815, 829 (2005) (discussing the link between global terror and Al Qaeda's brand of Islamic fundamentalism).

[9] *See* CASANOVA, *supra* note 7, at 3 ("Religion in the 1980's went public . . . . leaving its assigned place in the private sphere [and thrusting] itself into the public arena of moral and political contestation. . . . [Among the developments responsible for this change] were the Islamic Revolution in Iran; the rise of the Solidarity movement in Poland; the role of Catholicism . . . in . . . political conflicts throughout Latin America; and the public reemergence of Protestant fundamentalism as a force in American politics.").

[10] *Id.* at 5-6.

[11] *See* Michel Rosenfeld, *A Pluralist Critique of the Constitutional Treatment of Religion*, *in* THE LAW OF RELIGIOUS IDENTITY: MODELS FOR POST-COMMUNISM 39, 40 (András Sajó & Sholomo Avineri eds., 1999).

[12] *See generally* Jürgen Habermas, *Conceptions of Modernity: A Look Back at Two Traditions*, *in* JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 130, 138-40 (Max Pensky ed. & trans., Polity 2001) (1998).

[13] *Id.* at 140.

[14] *See* Jürgen Habermas, *The Postnational Constellation and the Future of Democracy*, *in* HABERMAS, *supra* note 12, at 58, 88.

[15] The conception of post-modernism implied by these remarks is consistent with Habermas's

Modernism and pursuit of the Enlightenment project not only displace religion by confining it to the private sphere, but they also relativize it. They relativize it, moreover, in two different respects. First, they force the religious to act consistent with the dictates of Reason and the Enlightenment to the extent that they must partake in life within the public sphere. And second, in the inevitable confrontation between the faith practiced at home and reason as imposed in the public square—and as the consequence of being constantly reminded that officially all religions are equivalent—it becomes highly likely that even *in foro interno* one's religion will become less all-encompassing and less prone to leading to assertions of absolute truth as against all believers as well as all non-believers.[16]

Viewed in light of the "disenchantment of reason" and of the consequent retreat of modernism, post-modern subjectivism and the revival of religion, including the spread of religious fundamentalism,[17] loom as two sides of the same coin as they seek to fill the void left by the retreat of Reason. Religion, accordingly, becomes "de-relativized" at the same time that it becomes "deprivatized," and as a corollary, secularism falls off its modernist pedestal and becomes yet one more religion or purely subjective post-modern ideology. Or more precisely, as Reason loses its modernist grip, religion (moved from within) finds more room to project its truth as absolute and exclusive, while secularism viewed from the outside becomes more susceptible to being cast as yet one more (false) religion. This, moreover, transforms the conflict between Faith and Reason into a conflict among competing Faiths—a transformation that has proven to be of more than purely theoretical interest. For example, in the 1980's, Protestant fundamentalist parents brought cases before the U.S. federal courts, in

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views on the matter, but there are many different, often contradictory, conceptions of post-modernism. For example, Jacques Derrida, one of the foremost post-modern philosophers, has insisted that post-modernism is consistent with pursuit of the Enlightenment project. For a discussion of the contrast between Derrida's and Habermas's understanding of the historical deployment of the Enlightenment project, see Rosenfeld, *supra* note 8, at 826-31, 836-37.

[16] *Cf.* Jürgen Habermas, *Reconstructing Terrorism*, in PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA, 45, 70, 72, 78 (Giovanna Borradori ed., 2003). What distinguishes fundamentalist religion viewed as a violent reaction against modernism from modern religion is not the content of belief but its *modality*. Religious fundamentalists regard the truths of their own religion as absolute, leaving no room for science or other religions. *Id.*

[17] A distinction must be drawn, for present purposes, between religious fundamentalism as a religious matter and as a politico-constitutional matter. From a purely religious standpoint, a "fundamentalist" is someone who takes holy texts literally; from a politico-constitutional standpoint, in contrast, a "religious fundamentalist" is one who considers his or her religion as the exclusive and absolute truth and who insists that the state be ruled pursuant to the dictates of the true religion. Thus, mullahs in Iran and certain ultra-Orthodox rabbis in Israel who believe that the state should be ruled in strict conformity with religious precepts and laws may nonetheless not endorse literal interpretations of the Koran or of the Torah respectively. Unless otherwise specified, "pluralism" will be used here in its politico-constitutional meaning.

which they sought condemnation of the curriculum of the public schools attended by their children as unconstitutionally imposing the "religion" of "secular humanism" in violation of the Establishment Clause.[18] The courts rejected the claim that the teaching of "secular humanism" violates the Establishment Clause,[19] but in so doing did little to debunk the logic of the complaining parents.

To the extent that fundamentalists regard their religion as the absolute truth and as establishing a comprehensive vision that accounts for everything under the sun (and beyond) to the last detail, then any utterance that does not accord with their religious truth can be characterized plausibly as issuing from another (false) religion. A mere statement in a literary text read during English class to the effect that "nature is powerful and beautiful in its mysterious ways" which would strike an average contemporary reader as innocuous and devoid of significant religious connation would hence be doubly offensive to fundamentalist parents like those who brought suit. First, the statement in question is contrary to these parents' religion, which asserts that nature can in no way be considered as being independent from the will of God. And, second, that in forcing these parents' children to read this statement (and others like it) the school is spreading false religion—or subjective ideology, to use the language of post-modernism—that denies the existence of God or at least his omnipresence and omnipotence.[20]

As mentioned above, the federal courts that refused to treat "secular humanism" as a religion for purposes of the Establishment Clause did not really address the plaintiff's arguments directly, and it is now evident why. The plaintiff's arguments were both fundamentalist (concerning secularism—which they characterized as "secular *humanism*" to stress that they considered it a false religion that deifies humans rather than venerating God). In contrast, the only plausible justification for the courts' decisions is a modernist one that adheres to the separation between Faith and Reason and that considers secularism as different in kind from religion.

This conflict between the visions of fundamentalist Protestants and U.S. federal judges in the 1980's may seem arcane and no more than an isolated instance, pitting a handful of religious fanatics against the secular establishment committed to Reason, constitutionalism and religious freedom for all. Upon closer scrutiny, and particularly when

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[18] *See* Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985).

[19] *Id.*

[20] Similar reasoning is involved in efforts to prohibit the teaching of evolution in public schools or to combine its teaching with the teaching of creationism. *See* Guy Haarscher, *Religious Revival and Pseudo-Secularism*, 30 CARDOZO L. REV. 2799 (2009).

projected into its own future, however, the conflict in question looms as emblematic of the current predicament. Today, religious revival, fundamentalism and post-modern subjectivism seem ever more present than they did in the 1980's, while at the same time there are intensified efforts to buttress and reinforce secularism.[21] Accordingly, whether constitutionalism, secularism and religion can be reconciled within present-day polities depends to a large extent on whether the conflict between the modern and the post-modern (including "deprivatized" and"derelativized" religion) can be successfully handled and managed even if it cannot be fully resolved.

All the contributions to this Symposium address and shed light on this crucial issue, or on some key aspect of it from a large number of different perspectives, traditions, constitutional backgrounds, disciplines and parts of the world. To better situate and be in an optimal position to evaluate these contributions and their import, it is necessary to inquire further into the relevant conceptual and historical circumstances that have led to the current predicament and that circumscribe the nature and scope of plausible solutions to the daunting challenges that it poses. With this in mind, I will briefly focus on the conditions that would optimize the treatment of religion according to the values and aims of the Enlightenment. This will hopefully provide a useful baseline for discussion and evaluation (II). Next, I will provide a summary comparative overview of the principal different ways in which the constitutional relationship between the state and religion has actually been handled, placing each of these in their relevant historical and conceptual context (III). Finally, I will sketch a rough outline of the range of possible solutions to the dilemmas raised by the current predicament. In doing so, I will inquire into whether contemporary ideological, cultural, social, political and constitutional realities make it impossible or undesirable to continue the pursuit of the Enlightenment project (IV).

II.   THE IDEAL CONDITIONS FOR CONSTITUTIONAL ACCOMMODATION OF SECULARISM AND RELIGION IN ACCORDANCE WITH THE ENLIGHTENMENT PROJECT

As will be discussed in (III) below, none of the types of constitutional treatment of religion actually in force in contemporary democratic polities fully conforms to the dictates of the Enlightenment. Given the number and variety of experiences involved, it seems most

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[21] *See, e.g.*, Patrick Weil, *Why the French Laïcité Is Liberal*, 30 CARDOZO L. REV. 2699 (2009) (discussing recent legal initiatives to reinforce secularism (laïcité) in French public institutions).

unlikely that any entirely successful alternative is looming over the horizon. It seems useful, accordingly, to inquire into the ideal conditions that would be best suited to allow for the optimal relationship between secularism and religion, consistent with full realization of the objects set by the Enlightenment project. Once identified, these ideal conditions should provide a workable counterfactual[22] yielding a baseline against which to assess existing arrangements and furnishing adequate criteria for determining whether existing models of constitutional regulation might be perfectible or whether the Enlightenment project is ultimately doomed to failure (at least as it pertains to its handling of religion).

In light of the essential tenets of the Enlightenment described above[23] and of the implications of the latter with respect to religion,[24] establishing the ideal conditions for optimal constitutional accommodation of secularism and religion would depend above all on achieving the following essentials. First, it is imperative to set a clear and workable divide between Faith and Reason. Second, it is necessary to elaborate a conception of secularism that is truly *areligious* and that neither favors nor disadvantages any religion or the non-religious. Third, a way must be found to institute a public sphere that is clearly and firmly delimited from the private sphere and that is entirely amenable to the rule of areligious secularism. And fourth, the private sphere must be populated by religions and non-religious ideologies that are susceptible of being veritably treated equally—*i.e.*, of benefiting of *substantive* as opposed to merely formal equal treatment[25]—and that are amenable to confining their expression and activities within the precincts of the private sphere.

Notwithstanding the attacks, alluded to above, launched by post-modernism and by revival religion,[26] the first of the four essentials clearly seems the easiest to achieve in theory and to set in motion as a fruitful counterfactual. This can be done by drawing the line between that which is amenable to the methods used in scientific inquiry or is

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[22] A counterfactual is a constructed model that is contrary-to-fact but bears sufficient connections to relevant factual orderings to furnish workable criteria of perfectibility or appropriate standards for purposes of critique. *See* MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 124 (1998) ("[C]ounterfactual construct of a pristine market economy with evenly matched competitors, perfect information, and no transaction costs can be useful either to critique existing markets as self-legitimating procedural mechanisms or to vindicate such real-life markets because of their greater proximity to their counterfactual counterparts than any plausible alternative.").

[23] *See supra* pp. 2333-34.

[24] *See supra* pp. 2335-36.

[25] For example, in a polity comprised of Christians, Jews and Muslims, a legal prohibition of male circumcision would treat all three religions equally from a formal, but not from a substantive, standpoint. This is because whereas Judaism and Islam prescribe male circumcision, Christianity does not.

[26] *See supra* pp. 2335-36.

susceptible of empirical or rational verification, on the one hand, and that which is not, such as religious beliefs or metaphysical convictions, on the other.   At a counterfactual level at least, this line can be consistently and systematically maintained, making it conceivable to institutionally impose exclusive reliance on Reason to the exclusion of Faith in the public sphere.[27]   Thus, for example, a claim that greater irrigation would yield better crops that is susceptible of empirical verification, would be admissible in the public sphere, but not a claim that recital of a particular prayers should be mandated to avert a drought.   Similarly, as Guy Haarscher indicates in his contribution to this Symposium, "creationism" and "intelligent design," which some wish to have taught in U.S. public schools alongside the theory of evolution, unlike the latter are not susceptible to validation or falsification pursuant to scientifically acceptable standards.[28]

That the divide between Faith and Reason considered here can function successfully at the counterfactual level does not imply that it could do so under actual historical circumstances, or even that it would be desirable to adhere to it systematically in practice.   Moreover, strict adherence to this divide would not only exclude religion and religious claims from the public sphere, but also morals and moral claims and even arguably politics and (certain) political claims.

Take, for instance, Kant's famous moral claim that we ought to treat all fellow humans as ends and not as means.   This claim is certainly not susceptible to empirical or scientific validation or falsification.   Ought it therefore be excluded, consistent with the counterfactual under consideration, from the public sphere?   Arguably yes, inasmuch as moral claims are akin to religious claims from the standpoint of the strictly confined definition of Reason within the counterfactual in question.

One may object that Kantian morality (and Kant himself) appeal to public reason, *i.e.*, to "reasons accessible to all, irrespective of their religious belief,"[29] and Kantian morality is therefore clearing within the realm of Reason as conceived by the foremost philosopher of the Enlightenment.   This is an undeniable historical fact, but one can still defend the narrower conception of reason carved out consistent with our counterfactual as being better suited for purposes of constructing ideal conditions.   Indeed, whereas Kantian morality does not depend on any religious belief in a transcendent deity, it is nonetheless not empirically

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[27] The divide contemplated here is akin to the one relating to the Rawlsian concept of "public reason" discussed in this symposium in the contributions by Kent Greenawalt, *Secularism, Religion, and Liberal Democracy in the United States*, 30 CARDOZO L. REV. 2383 (2009), and Sajó, *supra* note 6.

[28] *See* Haarscher, *supra* note 20, at 2817.

[29] Sajó, *supra* note 6, at 2401 (citing to Immanuel Kant, *An Answer to the Question: "What is Enlightenment?*," *in* POLITICAL WRITINGS 54, 55 (Hans Reiss ed., 1991)).

or scientifically veritable, or even susceptible to being proved normatively valid through an exclusive appeal to reason. As a matter of fact, one can plausibly accuse Kantian morality of being ultimately but an expression of the "religion" of "secular humanism." Not only are the claims made by Kantian morality beyond any factual verification, but also, unlike the propositions of logic, they need not be accepted as valid by anyone who makes proper use of his or her rational capabilities. Thus, it seems no less rational to embrace a utilitarian brand of morality that would prescribe using persons as means to the extent that this would promote the greatest happiness of the greatest number than to strictly adhere to Kantian morality.

The reason that Kantian morality can be characterized plausibly as a manifestation of the "religion" of "secular humanism" is because it is ultimately grounded on an act of faith. To illustrate this, suppose a confrontation between a proponent of Kantian morals and a religion that stipulates that all humans are but means for God's great design for the future of the universe and that, accordingly, they must follow a strict religious morality consisting exclusively of fulfilling duties towards God without being entitled to any rights as against God or humans. Suppose further that the believer asks the Kantian on what grounds she considers her morals superior, and that she replies that she does so because her morals appeal to public reason and not to faith. At that point, the believer could reply that the Kantian's exclusive focus on humans and appeal to public reason necessarily imply a rejection of the existence of God or denial of his relevance to, or interest in, matters of human morality, and that all of these inevitably involve assumptions based on faith of certain propositions that are as impossible to prove as is the existence of God. Moreover, the believer could also plausibly insist that this last argument appeals to public reason just as much as arguments deriving from Kantian morals. Indeed, the believer's argument boils down to the claim that reason can neither prove nor disprove the existence of God, nor determine whether God does, or ought to, prescribe a true morality for humans. Accordingly, asserting or denying that God has a role in human morality are both ultimately dependent on an act of faith.

It should be clear now why the counterfactual elaborated in the search for ideal conditions should confine itself to a narrow definition of the realm of Reason that excludes some claims that would be acceptable under a Kantian or Rawlsian conception of public reason. Under the narrow definition in question, the realm of Reason would be confined to empirically or scientifically verifiable or falsifiable claims, as well as to those claims to public reason that would or should be accepted by everyone, provided they firmly engaged in the proper exercise of their rational capacities. By drawing the line narrowly, the counterfactual

protects against endless discussion and blurring and against the constant danger of unleashing interminable slippery slopes.[30]

As indicated above, the ban from the counterfactual realm of Reason should extend not only to morals but also to *some* politics and to *some* political claims. More specifically, to the extent that the realm of politics encompasses both the setting of ends for the life of the polity and of means to such ends, the counterfactual should exclude from the realm of Reason all claims pertaining to political ends and those claims pertaining to political means that may not *ever* be susceptible to validation of falsification by science, experience or reason. The political ends of a society may have religious or secular origins, but in either case they ultimately depend on an act of faith in the same sense that morals do. Whether the goal of politics in a particular polity be the establishment of a common life pursuant to the dictates of a given religion, the pursuit of the maximization of wealth, the promotion of a common culture, the fostering of harmony and solidarity among the citizenry, etc., the necessary justification involved is dependent on normative claims that are ultimately grounded in some act of faith—just as are religious beliefs and Kantian or utilitarian morality. Hence, the exclusion of the politics of ends is justified in the same fashion as that of morals in the delimitation of the appropriate counterfactual realm of Reason.

The politics of means, in contrast, are in most cases amenable to standards of verification and falsification, at least as most broadly understood. If we agree that the paramount goal for the polity is the maximization of wealth, we can certainly subject competing policy means offered in pursuit of that goal to accepted standards of validation and falsification. Moreover, that a particular policy means cannot be at present validated or falsified should not pose a problem so long as it remains in principle subject to eventual validation or falsification. For example, it may be at some point uncertain whether a more liberal or a more conservative fiscal policy would better serve the goal of maximizing wealth. Nevertheless, the question concerning which of these two fiscal policies is better suited to advance the policy goal in question can be submitted to accepted standards of validation and falsification, and nothing precludes that one day it will be answered definitively in conformity with these standards. Accordingly, all

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[30] This counterfactual achievement does not imply, of course, anything similar at the factual level. Moreover, whereas the believer can certainly deny the validity or relevance of science just as he can deny the validity of the categorical imperative in the case of Kantian morals, there is a crucial difference between the realm of science and that of morals. What *counts* as science—as opposed to its relevance, utility or desirability—can be systematically determined in accordance with a set of established standards open to all. Because of this, to determine whether an assertion does belong to the realm of science (or empirical observation or logic) does not involve any act of faith in the sense that any assertion to validity in morals does.

politics of means in principle susceptible of validation or falsification in relation to their potential for advancing the ends towards which they are directed should be included within the counterfactual realm of Reason erected in the pursuit of ideal conditions.

Defining the contours of the second among four essentials, namely a version of secularism that is areligious and that neither favors nor disfavors any religion or the non-religious, looms as a much more daunting task than the one just completed regarding the first essential. One may be tempted to tailor the counterfactual definition of secularism to the counterfactual delimitation of the divide between Faith and Reason articulated above. That, however, would not be satisfactory because whereas the epistemological distinction between what falls within the purview of science and what does not is unexceptionable, it does not follow that a secularism tailored to fit that divide would necessarily qualify as areligious. Indeed, acting in the public sphere in conformity with science may readily qualify as anti-religious from the standpoint of at least some religions. For example, state mandated vaccination of the entire population to prevent a deadly epidemic would be justified pursuant to universally accepted standards of contemporary medical science and yet at the same time counter a particular religion's prescription of any medical intervention as being against the will of God. The latter religion need not question the effectiveness of the vaccine as that may be irrelevant in terms of the belief in the divine proscription to which it feels compelled to adhere. Similarly, if the state mandates the teaching of evolution theory in its public schools while prohibiting the teaching of creationism or intelligent design in science courses, it would adhere to the counterfactual divide between Reason and Faith but would be subject to condemnation as anti-religious from the perspective of those religions whose truths are incompatible with the claims of evolution theory. They would only have to claim that having science rather than (their) religion rule the public sphere is normatively unwarranted, thus backing their conclusion that any version of secularism that calls for the teaching of evolution theory in public schools in anti-religious.

It seems, in view of the preceding observations, that no plausible conception of secularism can be cogently cast as *inherently* areligious, even as a purely counterfactual matter. This does not mean that the second essential must be dropped, but it does require that it be coordinated in a relational manner with the third and fourth essentials. Indeed, for secularism to be able to count as being areligious it need not avoid conflict with all religions, but only with those with a presence within the relevant polity. Thus, if a universal state mandated vaccination policy is introduced in a polity only comprised of religions that would all approve of such policy as life-saving or life-enhancing,

then such policy would qualify as areligious within the context of that polity. Under such circumstances, no one within the latter polity would object to the vaccination policy on either religious or anti-religious grounds. Similarly, if the public sphere within the polity in question were reserved exclusively for the promotion of public health and the promotion of other political ends equally shared by all existing religious and non-religious ideologies with adherents within that polity, then all political means adopted to further the commonly accepted political ends would comport with a viable counterfactual conception of areligious secularism. Thus, for example, if all religions and non-religious ideologies within a polity concurred on the desirability of the goal of maximizing wealth—even if for different reasons as in the case in which some of the non-religious consider pursuit of that goal an end in itself whereas their religious counterparts deem it a desirable means for purposes of retribution through charity—then using the public sphere as the locus for selection and implementation of policies designed to promote the maximization of wealth would comport with the implantation of areligious secularism.

The characteristics of the third essential, a public sphere clearly distinguishable from the private sphere and amenable to exclusive rule under the precepts of areligious secularism, readily emerge in light of the previous discussion. From a counterfactual perspective oriented toward postulating ideal conditions, the divide between the public and the private sphere should track the counterfactual divide between Reason and Faith that informs the first essential. The public sphere, accordingly, should be exclusively confined to what may be encompassed within the realm of Reason. The private sphere, on the other hand, should be conceived of as being simultaneously amenable to functioning according to the strictures of the realm of Faith as well as according to the requirements of the realm of Reason. This should make for conditions conducive to peaceful coexistence among adherents to different religions, proponents of different post-modern ideologies, and defenders of modernism and of the Enlightenment project. Moreover, the exclusivity of the realm of Reason within the public sphere would be indispensable for two separate reasons: First, for maintaining a clear and cogent boundary between what ought to be public and what to be private; and second, to reserve sufficient space for the possible operation of some viable version of areligious secularism.

Since even under the best of circumstances, there would seem to be relatively little chance that adherents to all different ideologies within a given polity would agree to characterize its public sphere as areligious (or to treat it as amounting to something areligious, as would be the case where the religious consider the public sphere in question to be in conformity with their religion, and the anti-religious with their own

outlook), the ideal counterfactual public sphere should be as reduced in scope as possible and directed mainly, if not exclusively, towards politics of means and toward policies designed to further the achievement of political ends over which there is a general consensus.

The fourth essential is that religions and non-religious ideologies being relegated to the private sphere be susceptible of substantive equal treatment within the confines of that sphere. For this to be possible even counterfactually, it is necessary that no religion involved claim an entitlement in accordance with its own religious norms to priority or exclusivity with respect to other religions or non-religious ideologies within the polity, or to a stake in that polity's public sphere. Whether a particular polity could come close to meeting these counterfactual requirements would depend of course on its actual mix of religions and non-religious ideologies. Fundamentalist religions would obviously squarely negate any possibility of coming close to achieving the counterfactual requirements in question, as would any religion that requires intervention into the public sphere.[31]

The preceding discussion of the four essentials provides a fair idea of the counterfactual best suited to the ideal conditions for constitutional accommodation of secularism and religion within the ambit of the Enlightenment project. Before shifting from the counterfactual to the actual historical record concerning the relationship between secularism and religion, two further points warrant brief mention. The first of these is that certain political ideologies are better suited than others for purposes of approximating the counterfactual; the second, as already alluded to above, that some religions and some types of religion are more suited than others with the same purposes in mind.

The three principal political ideologies that are consistent with contemporary constitutional democracy and the ideals of the Enlightenment are liberalism, republicanism and communitarianism.[32] Liberalism is individualistic in outlook and conceives the political sphere chiefly as the proper locus for securing what each individual needs in terms of autonomy and welfare in order to allow that individual to pursue self-realization and self-fulfillment according to that individual's (religious or secular) conception of the good. There are several versions of liberalism ranging from the libertarian one espoused by Locke and Nozick to the egalitarian one articulated by Rawls. Of these, the libertarian vision has the narrowest conception of the public

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[31] *Cf.* Andrew F. March, *Are Secularism and Neutrality Attractive to Religious Minorities? Islamic Discussions of Western Secularism in the "Jurisprudence of Muslim Minorities" (*fiqh al-aqalliyyat*) Discourse*, 30 CARDOZO L. REV. 2821, 2828 (2009) (characterizing Islam as the religion with the most "unequivocal claim to a public, political vision" and as rejecting secularism explicitly).

[32] For a comparison of these three ideologies from a pluralist perspective, *see* ROSENFELD, *supra* note 22, at 217-24. The following brief account draws on that comparison.

sphere in the conviction that the individual is best off and able to achieve her ends while enjoying adequate autonomy and welfare under a minimal "night watchman" state confined to upholding formal rights, affording protection to personal security and to private property in a *laissez-faire* market economy.[33]

Republicanism centers on civic virtue and on promoting freedom through self-government. Pursuant to Rousseau's republican vision, each individual as citizen has a duty to join all fellow citizens to govern together in accordance with the prescriptions of the "general will." Republicanism requires constant intervention in the public sphere as it places self-determination through setting political ends (in conformity with the general will) and devising the means to achieve them at the top of its hierarchy of values. Republicanism's heavy emphasis on using the public sphere to set common political goals make it less likely than liberalism to conform to the exigencies of the counterfactual elaborated above or to lead to any close approximation of areligious secularism.

Communitarianism, for its part, assigns overriding status to solidarity and group loyalty. Communitarianism promotes collective self-realization and collective self-fulfillment in relation to commonly shared normative commitments and values. Communitarianism can be monistic, positing the entire polity as a single undivided community. Or it can be pluralistic, conceiving of the polity as a whole as a community comprised of several smaller sub-national communities linked through sufficient bonds of integration into the community of the whole. Many religions, particularly if they seamlessly integrate the relationships between the believer and the divinity with those (political, familial, social, etc.) among believers, as Islam and Judaism clearly do,[34] can be cast profitably in communal terms. If a religion dominates the community of the whole, then secularism becomes altogether impossible. Religious communities, however, can also constitute smaller communities within the larger one, with the community of the whole remaining secular. In the latter case, because of the importance under communitarianism of setting common goals and of acting together to achieve them, the community of the whole would have to be heavily invested in designing political, social and cultural objectives as well as in overseeing their implementation. Under these circumstances, it is difficult to imagine how the community of the whole could come close to satisfying the requirements of areligious secularism. For this reason, if not others, communitarianism, like republicanism, seems less suited than liberalism for the task of approximating a religious

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[33] *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 26-27 (1974).

[34] *See* March, *supra* note 31, at 2828 (describing the communal nature of Islam); and Gidi Sapir & Daniel Statman, *Religious Marriage in a Liberal State*, 30 CARDOZO L. REV. 2855, 2868-71 (2009) (communal aspects of Judaism).

secularism in particular, as well as the counterfactual conditions identified above.[35]

The second point mentioned above, namely that some religions seem more inherently compatible with areligious secularism than others, was already briefly addressed. Limited further elaboration is warranted, however, to allow for a better grasp of the implications of certain salient differences among various religions. Religions may run the gamut from, on one end, confinement to contemplation, meditation, and strictly personal one-to-one prayer or communication addressed to the divinity, to, on the other end, all encompassing religious rule, in accordance with a full set of religious laws, down to the most minute detail of the personal, social and political life of each believer and of the community of believers (and, in the case of an aggressively proselytizing religion, of each and everyone throughout the entire polity). Merely contemplative religion is obviously compatible with areligious secularism whereas aggressively proselytizing one is definitely not. Moreover, beyond these extremes, certain combinations of religions within a polity may be more amenable to approximation of religious secularism than others. Furthermore, of the three major Western religions, as pointed out in several contributions to this Symposium, Christianity seems much better suited to secularism than Islam or Judaism. This is due, in important part, to Christianity's commitment to the separation between the realm of God and that of Cesar as opposed to Islam's and Judaism's all encompassing approaches requiring that religious rule extend over both the public and the political sphere. Because of this key difference, the counterfactual construct pointing to ideal conditions would be better off embracing Christianity rather than its two major Western counterparts in order to yield the best possible approximation of areligious secularism. But that would create a paradox. If the pursuit of areligious secularism leads to a preference for Christianity, would that not undermine the whole project by lifting Christianity above Islam and Judaism?

Based on the preceding analysis, the counterfactual constructed to

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[35] One variant that may seem appealing at first would be the combining of liberalism at the level of the polity as a whole with communitarianism of smaller groups such as religious communities and other such communal groupings within the polity. Under further consideration, such alternative presents several drawbacks. If the smaller communities become virtually completely self-ruling, then minorities and dissidents within them are in danger of loosing their fundamental rights, including their freedom of religion rights. *See, e.g.*, Sapir & Statman, *supra* note 34, at 2868-71 (describing how the Orthodox rabbinate in Israel, with exclusive jurisdiction over marriage in Israel's Jewish community, curtail the right to marry of many non-believing Jews and of Jews belonging to the more liberal wings of Judaism). On the other hand, if the secular community of the whole limits the self-rule of smaller groups to safeguard the fundamental rights of their members, then the disruptions of communal life within religious communities would inevitably render the secularism of the community of the whole anti-religious.

account for the ideal conditions for an optional constitutional accommodation of secularism and religion within the ambit of the Enlightenment project does not provide a pristine model that many would be eager to emulate. On the one hand, this counterfactual contains features that are undesirable or impossible to approximate. It provides a sharp and sustainable divide between Reason and Faith, but the idea that Kantian morals should be barred from the public sphere for the same reason as fundamentalist religion seems highly unattractive. The counterfactual also calls for a liberal minimum night watchman state which would be both objectionable from a large number of perspectives and impossible to reasonably approximate under current conditions. On the other hand, even at the counterfactual level, the model in question is remarkably tenuous. It provides a conception of areligious secularism that cannot stand on its own, but is dependent on a fortuitous combination of religious and nonreligious ideologies being present in the relevant polity. And if that were to happen, it would turn out to be purely contingent. Accordingly, instead of shaping the counterfactual universe in which it is designed to operate, areligious secularism looms as entirely dependent on an improbable and rather unseemly manipulation so as to achieve a proper mix of religions and non-religious ideologies. Finally, even if the counterfactual does not automatically favor Christianity—and there is a good argument that it does not, but that it is rather only open to certain liberal versions of many religions, such as liberal Protestantism, Reform Judaism, etc.—it would require suppression of a large number of religious ideologies that happen to be firmly embedded in the daily lives of most contemporary constitutional democracies.

Leaving aside whether the above counterfactual construct provides an useful ideal model in spite of its many shortcomings, it is now time to focus on how various polities have handled the constitutional relationship between secularism and religion. As we shall see, the historical record is so much at odds with the counterfactual construct that, at best, the latter may provide useful critical insights, rather than any plausible leads for purposes of perfectibility.

III. The Constitutional Treatment of the Relationship Between Secularism and Religion in Comparative Perspective

To provide even a cursory overview of the current constitutional landscape, it is necessary to address briefly the following three subjects: First, to provide a description of the principal existing models of constitutional regulation of the relationship between secularism and religion; second, to compare the functioning of these models in terms of

the constitutional jurisprudences that they have respectively generated; and third, to account for important recent historical developments—such as the vast increase in religious pluralism or the large scale Muslim immigration to Western Europe—that pose vexing challenges to prevailing constitutional arrangements.

A.   *The Constitutional Models*

Under current constitutional practice, there are essentially five different models for managing the relationship between the state and religion. These are: 1) the militant secularist model bent on keeping religion completely out of the public sphere (*e.g.*, French and Turkish "*laicité*"); 2) the agnostic secularist model that seeks to maintain a neutral stance among religions but does not shy away from favoring religion over atheism and other non-religious perspectives (*e.g.*, this is close to current American constitutional jurisprudence); 3) the confessional secular model, which incorporates elements of the polity's mainstream majority religion, primarily for identitarian purposes, and projects them as part of the polity's constitutional secularism rather than as inextricably linked to the country's main religion (*e.g.*, Italy's or Bavaria's adoption of the crucifix as a secular symbol of national identity); 4) the official religion with institutionalized tolerance for minority religions model (*e.g.*, the United Kingdom, Scandinavian countries, Greece); and 5) the *millet* based model, in which high priority is given to collective self-government by each religious community within the polity (*e.g.*, Israel).

There are significant variants in relation to each of these models. For example, although both fall within model 1, French *laïcité* differs from its Turkish counterpart. Indeed, in France, *laïcité* was adopted in a social and political setting that was already significantly secularized,[36] whereas in Turkey, it was imposed by Kemal Attaturk to trigger a shift towards modernism and secularism in a polity where religion was overwhelmingly predominant.[37] As a consequence, as evinced by two countries' bans on the Islamic headscarves, French *laïcité* is directed against minority religions while remaining in synchrony with the culture emanating from the majority religion (and those minority religions that are compatible with that culture), whereas Turkish *laïcité* is squarely turned against the country's dominant majority religion.[38] Moreover,

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[36] *See* Michel Troper, *Sovereignty and Laïcité*, 30 CARDOZO L. REV. 2561 (2009).

[37] *See* Murat Borovali, *Islamic Headscarves and Slippery Slopes*, 30 CARDOZO L. REV. 2593 (2009).

[38] *See* Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629, 2660 (2009).

there is disagreement within the United States, where model 2 is in operation, whether secularism requires a full "wall of separation" between the state and religion, or whether the state can prefer religion over non-religion so long as it does not single out any religion for preferential treatment.[39] There can also be significant variants within model 3, the confessional secular model, depending, among other things, on whether the polity at stake has one dominant religion, as in the case in Italy, or whether it has more than one traditionally implanted religion, as is the case in Germany, where Catholicism is predominant in some regions and Protestantism in others. In the context of a single dominant religion, model 3 seems, in substance, quite close to model 4, which is itself open to a wide range of variants. Indeed, some established religions, such as the Church of England, seem to have little more than a ceremonial presence on the public sphere and may impinge on secularism less than some versions of the separatist approach under model 2.[40] By contrast, in other cases, such as that of Greece, the established religion can have a much more dominant role, tending to relegate minority religions close to the status of being merely tolerated. Finally, there are also many conceivable variants in connection with model 5. For instance, currently in Israel, recognized religious communities have a monopoly over marriage and divorce with respect to those whom they deem to be members of their community.[41] One could conceive, and there is much discussion about this in Israel,[42] of a *millet* system in which a secular civil libertarian alternative is available for those who wish to opt out from the religious community to which they belong.

Even before broaching the constitutional jurisprudence that emerges from these various models, it is quite obvious that all of them are beset by serious shortcomings. Not only do all these models completely fail the ideal of areligious secularism, but they also frustrate the aims of the religious, or of the non-religious, or of minority religions, or, in some cases, the aims of all three. Model 1 purports to be neutral toward religion, but the militant brand of secularism promoted by French and Turkish *laïcité* often seem downright hostile to religion. Model 2 may well put the non-religious at a disadvantage, and may also, in spite of its professed neutrality *among* religions, privilege mainstream religion as against "strong" or minority religions.[43] Model 3 seems particularly problematic, as confessional secularism is likely to be found wanting by most, if not all, confessions within the polity and

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[39] *See* Greenawalt, *supra* note 27.

[40] *See* Kent Greenawalt, *supra* note 27, at 2386-87.

[41] *See* Sapir & Statman, *supra* note 34, at 2868-71.

[42] *See id.* at 2873-78.

[43] *See* Rosenfeld, *supra* note 11, at 59.

by all those who are genuinely committed towards secularism. Indeed, "confessionalized" secularism is likely to offend both the very religious who would consider their deeply-held religious convictions trivialized, and the committed secularists who would feel their position being undermined through saturation of the public space with religious symbols and practices relabeled as secular.[44] In addition, Model 3 and Model 4 are bound to disfavor minority religions, thus altogether foreclosing the equal treatment all religions within the polity. Finally, Model 5, based on the *millet* system, is prone not only to disadvantaging secularism as already mentioned, but also to unduly privileging the group over the individual, as well as recognized religions and certain denominations within the latter (*e.g.*, in Israel, Orthodox Judaism to the exclusion of Conservative or Reform Judaism).

B.   *Lessons from Constitutional Jurisprudences*

An overview of the constitutional jurisprudences concerning the treatment of religion—and the contributions to this Symposium provide a rich and varied sampling touching on most of the key issues—reveals how fragile and malleable secularism is as a constitutional concept; how difficult it is for minority religions within a polity to secure adequate protection, let alone being treated as equals; how intractable clashes of ideology among religions, and between religions and non-religious ideologies, have tended to be; how elusive the search for a proper balance between constitutional rights pertaining to religion and other fundamental rights have proven to be; and how the rhetoric used in the battles over the constitutional treatment of religion has been stretched to the point that key doctrinal distinctions become almost completely blurred. As all these issues are treated in depth in the contributions to this Symposium, I will only deal with them in the broadest terms to highlight the most salient problems and challenges that they raise.

The fragility of secularism can be boiled down to the following three problems it inevitably confronts: Secularism is not what it appears to be; it is too much for some; and, at the same time, too little for others. In other words, not only is secularism in practice never areligious as it ought to be in theory, but because of its origins, functioning, and the environments in which it is deployed, it can never approximate the areligious ideal, even under the best of possible (as opposed to counterfactual) circumstances. Moreover, secularism has never achieved stability, as it has been in a constant tug of war between those who consider it to impinge too much on religion and those who deem it

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[44] *See id.*; Mancini, *supra* note 38, at 2634-35.

an insufficient shield against unwarranted encroachments of religion. The former tend to be the religious and the latter the non-religious, atheist or agnostic—but that need not to be the case, as secularism can become a sword or a shield used by one religion against another. It is obvious that if a dominant religion utilizes too much of the public space to the detriment of other religions, then the latter might find it useful to invoke secularism to prevent further encroachments or to regain lost ground. Perhaps less obvious, but also possible, is for secularism to be used by a majority religion to fend off a minority one, as is arguably the case in France to the extent that *laïcité* is largely compatible with Catholicism and is being used against Islam.[45]

The fragility of secularism is perhaps best illustrated by its trajectory in France. French *laïcité* appears to have the best claim for coming closest to areligious secularism and of coming short, if at all, on the side of anti-religious secularism. Yet, as Michel Troper's conceptual history of the term vividly brings to light, *laïcité* was the product of a particular accommodation between the French Catholic Church and the state.[46] To be sure, the deployment of *laïcité* in France required some restraints on religion, thus somewhat relativizing Catholicism within the polity. But at the same time, *laïcité* was molded in theory and practice so as to render the public space as compatible as possible with the culture associated with Catholicism, if not with the religion itself. This phenomenon is succinctly captured in the French popular term *"Catho-laïque"* used often to refer to a Catholicism that has adapted to *laïcité*, but that also connotes the corollary of a *laïcité* that has been fitted for harmonious co-existence with Catholicism.

Even under ideal conditions, for secularism to achieve meaningful neutrality, *i.e.*, to be genuinely areligious, the public sphere must be shrunk to a minimum, becoming almost exclusively the locus for discussions on how best to achieve objectives over which there is unanimous consensus throughout the polity. The ideal neutral secular public square must thus, in effect be, a "naked public square."[47] As Karl-Heinz Ladeur emphasizes in his account of German secularism, however, a naked public square is an unlivable environment, with the consequence that the push for secularism prompts a return of the repressed, which takes the form of a hybrid between religion and culture.[48] What this means is that secularism unleashes a process

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[45] *See* Mancini, *supra* note 38, at 2664 (discussing France's policy on the Islamic veil as at once both a reinforcement of France's Catholic heritage and an attack against Islam).

[46] *See* Troper, *supra* note 36, at 2568-69.

[47] *See* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984) (providing a critique of the aim of instituting a complete secularized public sphere in the U.S.).

[48] *See* Karl-Heinz Ladeur, *The Myth of the Neutral State and the Individualization of Religion: The Relationship Between State and Religion in the Face of Fundamentalism*, 30

whereby the majority or mainstream religion—or, in the case of Catholic and Protestant Germany, religions—becomes accultured while, by the same token, the culture in question incorporates or consolidates the symbols and ways of the world of the religion(s) in question. In Germany, this process is more open than in France, as religion is taught as part of the polity's culture in public schools and the state and religion are in other significant ways entangled notwithstanding the country's constitutional commitment to secularism.[49] In both France and Germany, however, mainstream religion becomes steeped in a culture of secularism, and secularism becomes a viable culture through incorporation and adaptation of elements drawn from mainstream religion. It is, therefore, not surprising that Islam should pose vexing problems in those countries, as it neither fits the mainstream religions nor the cultures with which they have become intertwined.[50]

Once one understands the seemingly inescapable alliance between majority or mainstream religion and the particular culture of secularism prevalent in a given polity, it becomes quite clear why minority religions tend to fare poorly in secular constitutional democracies. The various Symposium contributions dealing with the problems raised by the Islamic veil in Western Europe amply attest to that.[51] Moreover, it is not only against Islam, and not only in Europe, and secularism has proven discriminatory against non-mainstream religion. For example, in the United States, Mormons were refused exemptions from criminal laws against polygamy,[52] and adherents to a Native American religion were refused exemptions from criminal drug laws that prohibited the sacramental use of peyote.[53] In contrast, Catholics and Jews were granted exemptions for ritual use of wine at the time that the constitutional prohibition against the consumption of alcoholic beverages was in place.[54]

CARDOZO L. REV. 2445 (2009).

[49] *See* Matthias Mahlmann, *Freedom and Faith—Foundations of Freedom of Religion*, 30 CARDOZO L. REV. 2473 (2009).

[50] Some minority religions can be integrated within the mainstream over time by becoming more open to the polity's culture and by in turn making inroads into that culture in the course of a two-way dynamic. Thus, Jews who figured as the "other" in nineteenth century Europe have now joined mainstream religions and been replaced as the "other" by Muslims. *See* Maleiha Malik, Comment, *Muslims Are Now Getting the Same Treatment Jews Had a Century Ago*, THE GUARDIAN (U.K.), Feb. 2, 2007, at 35.

[51] *But see* Patrick Weil, *supra* note 21 (arguing that everyone, including Muslims, ended up better off in France as a consequence of the 2004 law banning the Islamic veil in French public schools).

[52] *See* Reynolds v. United States, 98 U.S. 145 (1878).

[53] *See* Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872 (1990).

[54] *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 727 (1994) (Kennedy, J., concurring in the judgment). Prohibition was instituted by adoption of the Eighteenth Amendment to the U.S. Constitution in 1919 and was repealed by the Twenty First Amendment in 1933.

As often alluded to in the preceding discussion,[55] ideological clashes among religions, and among religions and secularism, abound. Whether those clashes center around the teaching of evolution theory in public schools, the display of the crucifix, the wearing of the Islamic veil, stem cell research, abortion, euthanasia, same-sex marriage, polygamy or blasphemy, there seem to be no solutions acceptable to all parties involved. Moreover, though some of the above-mentioned clashes may be definitively resolved pursuant to a counterfactual ideal of secularism, actual versions of secularism vary so significantly, and intertwine respectively with such diverse arrays of religious cultures, that agreement even exclusively among secularists often seems impossible to achieve. Furthermore, these kinds of ideological clashes abound, even within the confines of individual religions. To cite but one example, interpretations of Islam differ as to whether Muslims in a country in which they constitute a minority ought or ought not interact with secular institutions in the public sphere or with adherents to other Abrahamic religions.[56] In sum, all of these profound and divisive ideological clashes seem ultimately intractable. Most of these must eventually be resolved within the ambit of the relevant constitutional jurisprudence. But that often fuels more bitter debate within the polity involved rather than lowering the passions or taking the issue, at least temporarily, off the table.[57]

Constitutional rights pertaining to religion often clash with other fundamental rights afforded constitutional protection. The most notorious conflicts are those that pit freedom of religion against the rights of woman,[58] and against the free speech rights.[59] As Dieter Grimm makes clear, doctrinal means have been, and can be, devised to handle the full gamut of constitutional claims relating to religion, including conflicts with other rights.[60] Constitutional adjudication of these latter conflicts seem best handled through application of the standard of proportionality and through judicial balancing commonly employed to resolve conflicts among constitutional rights generally.[61]

Application of the proportionality standard to conflicts of rights involving religion is problematic, however, in ways that are generally not at issue when religion is not at stake. For example, in a conflict

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[55] *See supra passim.*

[56] *See* March, *supra* note 31.

[57] A prime example of this was the aftermath of the U.S. Supreme Court decision in *Roe v. Wade*, 410 U.S. 113 (1973). *See also* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

[58] *See* Frances Raday, *Secular Constitutionalism Vindicated*, 30 CARDOZO L. REV. 2769 (2009).

[59] *See* Haarscher, *supra* note 20, at 2802-10.

[60] Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, 30 CARDOZO L. REV. 2369 (2009).

[61] *Id.*

between free speech rights and privacy rights, there is generally a background consensus that includes all the parties to the controversy as well as the adjudicator. They all share the premises that impart validity on the secular constitutional order in place and on the particular rights involved in the dispute. They all agree on the importance of free speech and privacy, but disagree on where to draw the line between them when they happen to be in conflict. When religion rights are at issue, in contrast, often the background consensus referred to above breaks down, with the freedom of religion claimant challenging the very premises of the secular constitutional order itself.

In a dispute where religion is not involved, proportionality analysis should legitimately assess all claims from the same perspective. But should the same principle apply when a religious claim is at issue? Or should such claims also be considered from the internal perspective of the religion involved? Or else, only evaluated from the secular perspective incorporated in the constitutional order?[62] This problem is compounded when the religion involved itself has a conception of the right that is being invoked against it. Thus, for example, as the various claims made in relation to the dispute over the Islamic veil amply illustrate, those arguing from within a religious tradition often oppose their religion's perspective on women's equality or dignity as against that advanced by liberal constitutionalism.[63] Is the woman who asserts that she is voluntarily wearing the veil a victim of gender-based equality? Or does the ban she confronts constitute an affront to her dignity and gender-based bias in as much as it assumes that she is not able to decide or fend for herself?

One further problem contributing to the difficulties posed by claims relating to religion derives from rhetorical shifts that make it much tougher to get a proper handle on the constitutional issues actually at stake, and an adequate gauge of the weight of the competing interests in play. Salient examples of these rhetorical shifts include the appropriation by proponents of religious worldviews of the rhetoric of free speech rights or anti-discrimination rights to bolster their freedom of religion objectives.[64] Free speech rhetoric has been invoked by religious group to argue for the teaching of creationism and intelligent design alongside evolution theory in state schools. Use of this rhetoric

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[62] This last question is only limited to the issue of ascribing a proper weight to the religion-based claim, and not to adjudication, proportionality or the constitutional order itself. In other words, the judges must operate from within the secular constitutional order, but arguably, at least, ought to consider the importance and weight of the religion-based claim from the internal religious perspective from which that claim emanates.

[63] *See* Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 CARDOZO L. REV. 2669 (2009) (discussing the European Court of Human Right's failures in using proportionality analysis and balancing in various cases on the Islamic veil).

[64] *See* Haarscher, *supra* note 20, at 2802-10.

seeks to displace the nature and import of the actual claim being made. When donned in free speech garb, the claim being advanced no longer looms primarily as setting a confrontation between religious truth and secular truth. Instead, it suggests that the state is curtailing the free marketplace of ideas by systematically censoring discussion of certain views shared by many within the polity from public fora in which the subject matter upon which these views purport to bear is widely discussed.

In other instances, religious groups have employed the rhetoric of constitutional equality and dignity rights in efforts to curb the free speech rights of those who they perceive as their religion's enemies. In this connection, critiques of Islam as a religion in a Western European country in which Muslims are a relatively small minority can be cast as being "racist," as amounting to an affront against the "identity" of the Muslim minority, and of "insulting" the latter *because* of its relation. In this way, critiques of religion, which traditionally played a key role in the implantation of Enlightenment-based secularism,[65] are transformed into group defamation based on religious affiliation.

Shifts in rhetoric can also be used by secularists or proponents of a majority religion against a religious minority to curtail the latter's religious freedom. By equating religion with beliefs rather than deeds, one can convey that certain actions or practices prescribed by a religion are not at their core "religious" in nature. If polygamy for the Mormons at the time of *Reynolds*,[66] or the use of peyote for Native American religion involved in *Smith*,[67] are regarded as separable from core religious beliefs, they can certainly be ascribed relatively little weight when balanced against societal interests with which they are in conflict. If, on the contrary, the practices are presented as seamlessly intertwined with religious beliefs and as central within the perspective of the religion to which they are linked, then they would immediately seem to warrant being given much greater weight, even if in the end they might still be outweighed by pressing societal concerns.

Some of the problems discussed above have long beset constitutional jurisprudences, while others have emerged or been aggravated due to significant changes of relatively recent vintage. A brief review of the most important among these is now warranted in order to place both the past and the future of the constitutional treatment of religion in its proper context.

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[65] *See* ROUSSEAU AND *L'INFÂME*: RELIGION, TOLERATION, AND FANATICISM IN THE AGE OF ENLIGHTENMENT 9 (Ourida Mostefai & John T. Scott eds., 2009) (characterizing Voltaire's famous battle cry, "*Écrasez L'Infâme!*," directed against the Catholic Church, as the "motto of the French Enlightenment").

[66] Reynolds v. United States, 98 U.S. 145 (1878).

[67] Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

C.   *Recent Historical Changes and New Trends*

Many changes, that may have originated earlier but that have greatly accelerated or become more fully visible since the 1980's, have converged to render the contemporary problems surrounding the relationship among constitutionalism, secularism and religion seemingly ever more acute.   As already mentioned, the 1980's saw a deprivatization of religion in various parts of the world.[68] In addition, by the end of the decade, the world became witness to the collapse of the Soviet Empire and shortly thereafter to the emergence of concurrent trends toward globalization and balkanization, which have set the stage, *inter alia*, for the emergence of global terrorism predicated on certain brands of fundamentalist religion.[69]   Moreover, the trend toward globalization has prompted vast migrations that have led both to significant increases in religious pluralism and diversity in numerous polities and to the arrival of sizeable religious minorities—such as Muslims in Western Europe—who find themselves often at profound odds with the secular and religious cultures of their country of immigration.

The significant changes resulting from these historical events and trends are far too numerous and complex to be addressed here in but a most summary fashion. Some of these changes and trends, or their direct impacts on religion, are addressed in many of the contributions that follow. I will therefore limit my remarks here to some very general observations that will hopefully shed some further light on the conditions surrounding the issues and problems identified above and on the most promising possible avenues for successful future handlings of them.

The Cold War period was dominated by the struggle between two superpowers, the United States and the Soviet Union, each committed to a different political ideology, respectively liberal capitalism and Marxist socialism.   Moreover, both of these competing ideologies were universalist in outlook and global in scope. Also, and significantly, they were both consistently committed to pursuit of the Enlightenment project—though to be sure each in its own separate way.[70]

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[68] *See supra* 2334-35.

[69] For more detailed discussion of these developments, *see* Rosenfeld, *supra* note 8, at 825-829.

[70] *Id.* at 826:
> [B]oth liberal capitalism and Marxist socialism rely on rationality and are committed to promoting liberty and equality for all. The main difference between them is that they disagree sharply over what rationality, liberty and equality entail, and that explains why they were in conflict. Nevertheless, the Cold War ideological divide is one that remains by and large within the confines of Enlightenment norms and values.

These two ideologies were sharply at odds over religion. Soviet Marxism prompted atheism, whereas American liberal capitalism was open to, and encouraging towards, religion.[71] Liberal capitalism is neither inherently religious nor irreligious, but the United States used its favorable views towards religion and its strong protection of religious freedom as a weapon against the Soviet Union.[72] This created a bond between the secular and the religious in America, the secular enlisting religion as an ally in the Cold War, and the religious finding greater government support and encouragement. But notwithstanding this bond, there was little danger of religion capturing the public sphere, as both America's secular establishment and its religious communities were united in an existential and a spiritual struggle against their country's Soviet antagonist.

With the fall of the Soviet empire, the needs for the special alliance between secularism and religion that had been predominant in Cold War America all but disappeared.[73] On the other hand, in post-Soviet Russia and East/Central Europe, there was a strong revival of religion in the making in newly-emancipated polities. This revival often went hand in hand with a rebirth of nationalism and recourse to ethnic-based identity politics. Religion and ethnic origin often combined to spur an identity politics bent on negating the universalist aspirations and militantly atheist ideology of Soviet Marxism.[74] In short, whereas in the United States religions became emancipated from their *political* subordination during the course of the Cold War, in the area of former Soviet dominance religion became not only resurgent, but often inextricably intertwined with nationalism and ethnic identity.

Globalization is at once the product of liberal capitalism now unhindered by Soviet-led socialism and the heir to the universalist

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[71] *See* Greenawalt, *supra* note 27, at 2383-84.

[72] In this respect, it is noteworthy that the words "under God" were added to the U.S. Pledge of Allegiance, changing the phrase "one nation indivisible" to "one nation indivisible under God" in 1954 during the Eisenhower Administration, sixty two years after the Pledge was originally written. *See* Newdow v. U.S. Congress, 292 F.3d 597, 609 (9th Cir. 2002) ("[T]he words 'under God' were intended to recognize a "Supreme Being," at a time when the government was publicly inveighing against atheistic Communism." (internal quotation marks omitted)).

[73] Although the alliance in question was predominant during the Cold War, it was not conflict was averted, as the contested jurisprudence regarding the Religion Clauses attests. *See* Greenawalt, *supra* note 27; Haarscher, *supra* note 20. Moreover, the "deprivatization" of religion promoted by Protestant fundamentalists in the U.S. was already manifest several years before the fall of the Berlin Wall. *See* CASANOVA, *supra* note 7, at 3. Nevertheless, the thrust of the present account is not affected by the developments. Indeed, by the 1980's, tensions with the Soviet Union under Gorbachov had already considerably lessened, thus affording more room to maneuver both to the religious and to the secular.

[74] One of the most salient examples of this amalgam of religion and ethnicity in politics is that of Bosnia, a multiethnic republic that had been a part of former Yugoslavia and that became tragically mired in a bloody civil war among ethnic Serbs belonging to Orthodox Christianity, ethnic Croats who were Catholic, and Bosniaks who were Muslims.

aspirations formally shared by liberal capitalism and Soviet Marxism. Globalization unhinges traditional poles of identity through its push for homogeneous worldwide markets, and thus promotes a further reinforcement of balkanization and identity politics. Balkanization is accordingly overdetermined: on the one hand, it is a reaction against the Soviet repression of religion and identity politics, and on the other hand, it constitutes a defense mechanism against the unwanted intrusions of ever-expanding global markets. To the extent that it accelerates the "disenchantment" of reason as noted already,[75] moreover, globalization itself propels a religious revival without a need for coupling it with balkanization. Thus, religion alone, as tends to be the case in the United States, or religion glued to ethnic identity, as is the case in balkanized polities, finds new ways to challenge secularism and liberal ideology.

Globalization also accelerates migration, as global capitalism calls for global labor. Such migration usually renders the host country more multi-cultural, multi-ethnic and religiously diverse. As indicated in the course of elaborating the counterfactual construct in Part II above, approximating areligious secularism becomes less and less likely as the number of religions in a polity proliferates.[76] Also, the more alien the religion and religious culture of the immigrants to a polity turn out to be, the more problems they are likely to encounter. These problems, in turn, are unlikely to become solved so long as the new religion does not share a common culture with the already-established religions within the polity, or with the brand of secularism associated with the latter.

Finally, historical change going much farther back, the advent of the welfare state, when combined the deprivatization of religion, progressively undermines the traditional divide between the public sphere and the private sphere to the point of vitiating most of its use in the context of present-day relationships between religion and the state. On the one hand, the state has become much more omnipresent throughout the contemporary polity. The contemporary state typically provides public education, public health, public funding for medical research, and the apportionment of public benefits, including individual and family welfare and pension benefits, to cite but some of the most obvious examples. At the same time, the contemporary state tends to reach deeper and deeper into what traditionally were deemed purely private relationships. Among other things, private employment relationships, as well as most market-based transactions among private parties, and even the most intimate aspects of private family life, such as the relation between spouses and between parents and children (at least when abuse and neglect within the home are at issue) are all, for the most part, subject to state regulation and active intervention.

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[75] *See supra* p. 2335.

[76] *See supra* p. 2344-45.

On the other hand, deprivatized religion tends to increasingly spill over into the public sphere. This is perhaps most obvious under the *millet* system, where religion monopolizes the regulation of marriage and divorce, but is also quite present in other contexts. For example, religious institutions are quite active in many polities that are in principle secular in public sphere battles over abortion, euthanasia, stem-cell research, same-sex marriage and multiple other issues of particular interest to religion. Moreover, what is most remarkable in this respect is not so much that they seek to promote and protect the interests of their own religious community with in the public arena. It is rather that they seek to subject the entire population of the polity to normative constraints emanating from their own religious tradition, but not shared by many other religious and secular members of the polity. To cite but one obvious example, the Catholic Church has often intervened in the public arena to promote a complete ban on abortion, even though abortion may be permissible from the standpoint of certain other religions and from that of the non-religious within the polity. In view of these concurrent trends of greater state intervention in the private sphere combined with the greater active role of religion in the public sphere, one wonders if it still makes sense to center constitutional relationships between secularism, religion and the state along the divide between the public and the private spheres.

IV. BEYOND THE PRESENT PREDICAMENT: CAN AND SHOULD THE ENLIGHTENMENT PROJECT BE SALVAGED?

It seems clear from the preceding discussion that it would be mostly unproductive to seek ever greater approximation of the ideal counterfactual construct elaborated in Part II above. Does that mean that the Enlightenment project must be completely abandoned when it comes to the constitutional treatment of religion? And even assuming that it need not, should it be abandoned?

The four essentials identified in connection with the ideal counterfactual cannot come close to realization, relegating the counterfactual to an instrument of critique rather than a standard of perfectability. Specifically: First, the strict divide between Reason and Faith it prescribes seems much too far removed from a world in which secularism and religion are as often allied as they are at odds, and in which non-religious ideologies cannot be categorically distinguished from religious ones, particularly as a result of the inroads of post-modernism and of deprivatized and de-relativized religion. Second, not only has secularism actually failed to be areligious in its *impact*, but it has proven religious or imbued with religious culture or with anti-

religious elements in its *content*. Third, the goal to maintain a workable divide between the public and the private sphere is becoming ever more elusive. And, fourth, as religions and non-religious ideologies multiply within the polity, and particularly when foreign ideologies steeped in alien cultures achieve a sizeable visible presence in a country of immigration with largely incompatible religious and cultural traditions, the prospect of substantive equal treatment for all the competing conceptions of the good found within the polity seems close to nil.

This does not mean that the Enlightenment project has necessarily become futile, but it does require that it be transformed and reoriented. The divide between Reason and Faith need not be abandoned, but it must be conceived as much more fluid and uncertain, and it must be redeployed to address current threats to core Enlightenment values as opposed to those of the past. In the Eighteenth Century, it was organized religion that was the Enlightenment's fiercest adversary; today, it is fundamentalist and strong religions, with more moderate and more liberal religions often barely, if at all, at odds with scientific reason. One possibility, therefore, is to switch to a situational and relational approach. Taken together, the two contributions to the Symposium that focus on public reason hint at what such a shift might encompass. Kent Greenawalt presents a nuanced and open-ended picture of the workings of public reason in harmony with the political and constitutional treatment of religion in the United States.[77] András Sajó, on the other hand, considers public reason from the standpoint of the inroads of, and threats posed by, religious fundamentalism and strong religion. In that context, he argues for reliance on a strongly and clearly demarcated conception of public reason.[78]

The distinction between the public and the private sphere may no longer be useful for present purposes, but it might be fruitfully replaced by reliance on the contrast between *intra*-communal and *inter*-communal relationships. Broadly speaking, all those who share the same religious ideology[79] can be said to belong to a single religious community. Consistent with this, moreover, dealings within a single religious community are "intra-communal," whereas those involving two or more religious communities, or a religious and a secular community, or those that purport to transcend the bounds of all relevant religious communities, are "inter-communal."[80] Finally, the distinction

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[77] *See* Greenawalt, *supra* note 27.

[78] *See* Sajó, *supra* note 6.

[79] I emphasize "religious ideology" rather than "religion" in order to allow for the characterization of different sects or denominations to be treated as different communities, and for the dealings of a dissident member of a religion with his or her co-religionists to be deemed to be inter-communal if the context warrants.

[80] Although the intra-communal sphere may overlap, and on occasion even completely coincide, with the private sphere, and likewise, the inter-communal sphere with the public sphere,

between intra-communal and inter-communal as used here is not meant to be understood in an essentialist sense, but rather in a functional and contextual one. Thus, to the extent that an interdenominational group joins forces to combat an external threat, the dealings among the members of the various denominations involved are properly considered intra-communal. But, by the same token, other areas of interaction between the same actors where they are divided along denominational lines would properly considered inter-communal.

Based on this contrast, inter-communal dealings should be subjected to greater restrictions in the name of reason, as broadly redefined and incorporated in the polity's conception of secularism and in the name of a conception of liberty and equality that seeks fairness among the perspectives represented in the particular inter-communal setting involved. Genuinely intra-communal dealings—*i.e.*, those in which no one within the group feels so alienated as to be prompted to adopt what would amount to an inter-communal position *vis-à-vis* fellow members within the group—on the other hand, would be much less restricted, being by and large left alone so long as they do not pose any significant risk of interference with, or harm to, inter-communal dealings or the intra-communal dealings of other groups within the polity.

This approach would lessen the danger of veering too far in the direction of the naked public square, and make more room for a richer communal life among the diverse communities within the polity, consistent with the views advanced in Adam Seligman's contribution.[81] In spite of the advantages it presents, however, this approach would by no means afford satisfactory solutions to all the problems associated with the interface between constitutionalism, secularism and religion. Even in a polity reconstituted institutionally in terms of the dynamic between inter-communal and intra-communal dealings, the various religious and non-religious communities involved could plausibly remain internally closed and externally hostile, creating an atmosphere more akin to hardening Balkanization than harmonious cooperation and coexistence under the aegis of a common constitutional culture.

In spite of this danger, the fluidity of the relational approach afforded by the dynamic between intra-communal and inter-communal dealings, and the concurrent move away from certain rigid categorical distinctions of the past embodied in the counterfactual construct

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the intra-communal/inter-communal distinction is by no means coextensive with that between private and public. For example, under the *millet* system, each religious community is supposed to govern itself in internal matters, such as marriage, divorce, inheritance, etc., with its own legal system and courts. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 156 (1995). Accordingly, in the context of the *millet* system, many matters not confined within the private sphere remain nonetheless purely intra-communal.

[81] See Adam B. Seligman, *Living Together Differently*, 30 CARDOZO L. REV. 2881 (2009).

considered above, should encompass, and perhaps even prompt, greater openness and accommodation both within, and among, groups within the polity. Religions are not monolithic and are often susceptible of gradual adaptation to changed circumstances. This is clearly illustrated in Andrew March's recounting of the different ways in which Islam has dealt with its status as a minority religion in polities dominated by secularism and other religions.[82]   These range from virtually total inward withdrawal to significant cooperation with secular groups or with other monotheist religions within the polity.[83] By the same token, the non-religious can also adapt to some extent to the ways of the religious without compromising their own ideological commitments, as illustrated by Gidi Sapir and Daniel Statman.[84]

The attractiveness of framing relationships in terms of the distinction between the intra-communal and the inter-communal is enhanced given that the citizen of a typical contemporary constitutional democracy is bound to become immersed in a number of different communities at once and to have to negotiate conflicts and tensions that arise as a result. A German speaking Swiss Catholic feminist woman, for example, belongs to the Swiss nation, to one of its four main linguistic groups, to one of its two dominant religions, and to one socio-political group with particular aims and views regarding women's equality and gender-based relationships.   Depending   on   the circumstances, the woman in question may focus more on her national identity than her linguistic group identity, or vice versa. On some occasions, her Catholicism may be in tension or conflict with her feminism. Because of that, she may decide to live with a certain amount of dissonance and inconsistency, or seek reform from within— *e.g.*, working to achieve changes within the Catholic Church leading to the eventual anointment of women priests—or, feeling alienated from the Church, become a dissident who nonetheless wishes to remain within her religious community, or also, conceivably, feel that her commitments to her fellow Catholics and those to her fellow feminists are so incompatible that she must withdraw from one of these two communities.

What is crucial for our purposes is that this single individual must constantly shift from intra-communal to inter-communal perspectives in the management of her multiple allegiances; that she cannot avoid bringing some of the values she shares with her fellows in one community, *e.g.*, feminist values, into her intra-communal dealings in another community, *e.g.*, her Catholic religious community; and that short of experiencing such a strong sense of incompatibility as would

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82 *See* March, *supra* note 31.
83 *Id.*
84 *See* Sapir & Statman, *supra* note 34, at 2870-72.

prompt her to quit a group with whom she had strongly identified, she would strive to find ways to juggle her many loyalties and to live with tensions and inconsistencies bound to arise due to her multiple group membership. In short, this woman's difficulties could be mitigated through intermittent compartmentalization—*e.g.*, when praying in church she would not focus on her frustrations as a feminist—and projection of intra-communal values inter-communally—*e.g.*, bringing her feminist ideals to the table at meetings of her Catholic community group. Moreover, these operations that take place at the individual level can also be carried out at the collective level by various groups within the polity and the polity itself as the group of the whole. And, except in cases of clear incompatibility, this dynamic between intra-communal and inter-communal dealings should afford numerous possibilities for peaceful coexistence within a constitutional order among proponents of numerous and diverse religious and secular ideologies.

The dynamic between intra-communal and inter-communal dealings can also be helpful to reconfigure secularism in light of the futility of pursuing a neutral areligious ideal and of the seemingly inevitable links between secularism and religion revealed in the course of retracing the history of the various actual incarnations of the concept.[85] Functionally, secularism should promote peaceful and productive inter-communal relationships within the polity combined with guaranteeing maximum room for intra-communal autonomy consistent with preserving the integrity of the space needed for inter-communal exchanges. Substantively, on the other hand, secularism would draw on two distinct sources of identity. In part, secularism would draw on that which makes possible and facilitates inter-communal coordination and cooperation among religious ideologies, and among the latter and non-religious ones. What would be encompassed within this rubric would vary from one setting to the next, depending on the religions, history and cultures involved. In any case, incorporation of elements drawn from religion or religious culture would be entirely permissible. The criterion of validity for such elements derived from religion would not depend on how close or removed they may be from religion itself, but on whether they advance or hinder the smooth functioning of the requisite channels of inter-communal exchange.

In part also, secularism would draw on another sources of identity, rooted in the traditional Enlightenment conception of the term. In contrast to the first source of identity, which could be characterized as secularism's inter-communal identity, this second source could be regarded as secularism's intra-communal identity, or in other words, as

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[85] *See supra* Part III.B.

secularism's conception of itself as a separate and distinct ideology. Indeed, in all contemporary constitutional democracies, there are certain citizens who are secular rather than religious, who put science ahead of faith, and who believe that the pursuit of liberal liberty and equality for all should trump any divine prescription to the contrary. These "intra-communal" secularists have as much a right to have a place at the inter-communal table as do the proponents of the various religious ideologies.

Secularism's inter-communal identity is contextually dependent in that what might bring together proponents of various different ideologies depends on the actual ideologies involved. Secularism's intra-communal identity, in contrast, is self-contained, and one can easily imagine a well-functioning, self-enclosed, homogeneous, secular society cut off from all religion. In actuality, however, the gap between these two identities is likely to prove far less stark for three principal reasons. First, intra-communal secularism must figure in the elaboration of its inter-communal counterpart to the extent that the secularist ideology is present in the relevant polity. Second, given the tendency to develop plural identities and multi-group memberships, elements of the secularist ideology are bound to slip into intra-communal precincts of competing ideologies. Thus, some liberal religions are quite compatible with commitment to liberal liberty and equality for all. Moreover, some adherents of non-liberal religions may nonetheless embrace certain secular values and cope with the tensions involved through compartamentization. And, third, by the same token, proponents of intra-communal secularism need not shut the door to religion, and may in fact embrace religion without contradiction so long as they adhere to the primacy of the secular outlook.

Given its multiple functions and sources of identity, it stands to reason that secularism should be in constant flux and that it should be amenable to being used as both sword and shield. It is instructive, in this connection, to consider the example of France. As Pierre Birnbaum explains, Jews and Protestants took the lead in calling for the institutionalization of laïcité in France.[86] Yet, as already mentioned, instutionalized French laïcité has a distinct Catholic imprint.[87] One plausible explanation for this, consistent with the conception of secularism advanced here, is that acceptance of a majority religion imprint on secularism was the best achievable compromise for the latter, for the minority religions involved and for intra-communal secularists.

One key issue that arises in connection with the reconfiguration of secularism outlined above regards which religious and non-religious ideologies to include in the inter-communal sphere, and which to

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[86] *See* Pierre Birnbaum, *On the Secularization of the Public Square: Jews in France and in the United States*, 30 CARDOZO L. REV. 2431 (2009).

[87] *See supra* p. 2352.

exclude. It is clear that not all religions and non-religious ideologies can be included. A fundamentalist religion that seeks to either convert or kill those who do not adhere to it and a militant atheistic ideology that would prohibit and punish all religious manifestations would clearly have to be excluded from any polity that conforms to the basic tenets of constitutionalism.[88] But beyond that, why include a religion that strongly opposed secularism? Or, why include secularism in a setting where large majorities have a strong religious aversion to it?

From the standpoint of traditional Enlightenment values, secularism occupied a privileged place and the acceptance of religion was conditioned on compatibility with deployment of the secular project. This made the answers to the previous questions clear. The more a religion proved congruent with secularism, the more its admission to the secular polity was warranted. Conversely, religions that would interfere with the proper functioning of secularism would have to be excluded or restricted. In the context of the present reconfiguration of secularism, however, no such clear answers readily emerge. Secularism and the constitutional order it fosters are inherently tolerant of diversity, but as Ran Hirschl and Ayelet Shachar underscore, not of competition.[89] But why prefer secularism's tolerance over other kinds of tolerance or even over intolerant ideologies once one concedes that secularism as such is but one intra-communal ideology among many?

This last query forces one to focus on the larger question raised at the beginning of this Part: whether the Enlightenment project is worth preserving at this point in time, or whether it would be preferable to abandon it in favor of a more suitable alternative. And, given the recent inroads of post-modernism and derelativized religion as well as the continuing progression of the disenchantment of Reason, no readily available or obvious answer could be offered with confidence.

One can advance, however, two more modest answers. The first one is somewhat circular, but may nonetheless carry significant weight among proponents of constitutional democracy. Constitutionalism requires secularism (in some form) and they both go hand in hand with certain core Enlightenment values. Constitutionalism may thrive with a reconfigured on redeployed Enlightenment project, but it cannot survive the complete abandonment of the latter. Therefore, if for no other reason, the Enlightenment project ought to be preserved for the sake of constitutionalism.

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[88] Whereas it is clear that the project of these two ideologies should be made illegal, it is not so obvious that advocacy in favor of such projects should be treated likewise. This latter issue will not examined here as this is not necessary for present purposes.

[89] *See* Ran Hirschl & Ayelet Shachar, *The New Wall of Separation: Permitting Diversity, Restricting Competition*, 30 CARDOZO L. REV. 2535 (2009).

The second answer is that contemporary polities are typically multiethnic, multicultural and religiously diverse, and that secularism, at least in its inter-communal dimension, provides the best means to preserve the peace and to maintain the good functioning of such pluralistic societies. This second answer may be buttressed by either a lesser evil prudential argument or a more positive normative argument deriving from a pluralistic conception of the good. The former argument is predicated on the conviction that unless a standoff among competing ideologies is maintained, a serious threat to the public order would ensue. The latter more positive argument relies, for its part, on the premise that pluralism is good and worthy of pursuit because it multiplies and enhances every person's opportunities for self-realization and self-fulfillment. But regardless of which of these two arguments is invoked, reliance on secularism and core Enlightenment values seems indispensable. Indeed, peace among proponents of competing ideologies cannot endure without a hefty measure of mutual tolerance, and pluralism cannot be furthered without promoting liberty of choice and equality among persons and among viable perspectives.[90]

If, consistent with the counterfactual construct laid out in Part II, the traditional conception of the Enlightenment meshed better with liberalism, its reconfigured counterpart seems equally open to communitarianism and republicanism to the extent that these remain consistent with pluralism.[91] From the standpoint of traditional liberalism, freedom of, and from, religion are, strictly speaking, prerogatives of the individual, not of the group. Consistent with this, the legitimate rights of religious groups were reducible to a combination of the freedom of religion and freedom of association rights of their individual members. From the standpoint of the reconfigured secularism presented here, in contrast, the legitimacy of intra-communal religious relationships can be grounded in communitarianism, and the legitimacy of the intra-communal autonomy of religious groups can be predicated on the ethos of republicanism. In other words, so long as individuals have real choices and a certain number of basic rights within their group, including the right to exit, a far greater range of latitude can be extended legitimately to religious group solidarity and self-government objectives. And this, in turn, seems bound to vastly extend the field for, and the plausible configurations of, inter-communal

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[90] As already noted, perspectives that would lead to the destruction of pluralism, such as belligerent religious fundamentalism, cannot, of course, be tolerated. But all those that are *compatible* with the pluralist ethos, even if *inconsistent* with it in their outlook, such as an intolerant religion that remains inward-looking and that does not interfere with inter-communal relationships, would be entitled to enjoy substantial intra-communal autonomy.

[91] For an extended discussion of the place and role of liberalism, republicanism and communitarianism within a pluralist conception of the good, see ROSENFELD, *supra* note 22, at 216-234.

secularism, hopefully enabling it to better accommodate a greater and more diverse set of religious and non-religious ideologies.

Whereas the line between admissible and inadmissible religions or religious ideologies under this reconfigured conception of secularism is clear in theory, undoubtedly it will be, in several instances, difficult to draw in practice. Leaving that aside, once a religion has been identified as clearly inadmissible, as would be the case for a belligerent fundamentalist one, then the fight against it would most effectively be conducted under the aegis of the precepts of liberalism. Under such circumstances, not only the secular community, but also all other religious communities within the polity would be under existential threat. The resulting struggle would be largely analogous to that between secularists and the organized dominant religion at the time of the Enlightenment. Accordingly, if a polity is reduced to a struggle to death between belligerent religious fundamentalism and all other groups within, it might give the impression that basically nothing has changed since the French Revolution. But that impression would be highly misleading, as the fundamentalist threat is only one among the many challenges that confront contemporary secularism and constitutional democracies.

The contributions to this Symposium taken collectively provide a rich, nuanced, varied and compelling account of the principal contemporary issues and debates centering on the relationship between constitutionalism, secularism and religion. A great diversity of subjects and viewpoints will be found in the pages that follow. What the contributions to this Symposium make clear, however, is that traditional concepts and views relating to the constitutional treatment of religion must be rethought and reworked. What remains much more a matter of debate is whether some of the key familiar concepts and approaches ought to be altogether set aside and replaced.

The preceding discussion leaves one with a vexing lingering question. The version of the Enlightenment project needed for the legitimation and operation of contemporary reconfigured secularism is dramatically more modest, less assertive, and less encompassing than that which emerged in the Age of the Enlightenment. Is that due to the ravages of post-modernism and derelativized religion? Or, is it rather due to the fact that much of the Enlightenment project has met with success and has become quietly internalized and subconsciously stored in the public psyche of contemporary constitutional democracies?