

SPIRITUALITY, FUNDAMENTALISM, LIBERTY: RELIGION AT THE END OF MODERNITY

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And the Word became flesh, and dwelt among us.

—John 1:14

INTRODUCTION

Our world has fallen apart. Not literally, of course, but metaphysically. We no longer possess an understanding of the place and purpose of humanity that would infuse every life with the same ultimate meaning. References to this metaphysical crisis appear throughout the arts and humanities. We are described as living “at the end of an age,”¹ and in the “twilight of Being,”² struggling through an “aftermath of confusion and helplessness.”³ Ours is a time of “slackening,” a “splintering of culture” and a “shattering of belief,”⁴ marked by “pastiche,” “dissonance,” and “atonal experiment.”⁵ Our existence is “unbearably light,”⁶ our thought is “weak,”⁷ and even the “real”

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1. See JOHN LUKACS, *AT THE END OF AN AGE* (2002).
2. GIANNI VATTIMO, *AFTER CHRISTIANITY* 77 (Luca D’Isanto trans., 2002).
3. HANNAH ARENDT, *Tradition and the Modern Age*, in *BETWEEN PAST AND FUTURE* 17, 18 (1968).
4. Jean-François Lyotard, *Answering the Question: What Is Postmodernism?* (Régis Durand trans., 1982) [hereinafter Lyotard, *What Is Postmodernism?*], reprinted in JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* app. 1, at 71, 72, 77 (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984) (1979) [hereinafter LYOTARD, *THE POSTMODERN CONDITION*].
5. Martin E. Marty, *The Widening Gyres of Religion and Law*, 45 *DEPAUL L. REV.* 651, 654 (1996).
6. MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* (Michael Henry Heim trans., 1984).

world lacks reality.⁸ “[T]he epoch in which we live today,” writes Gianni Vattimo, “is the epoch in which reality can no longer be conceived of as a structure solidly tied to a sole foundation that philosophy would have the task of knowing, or . . . that religion would have the task of adoring.”⁹ Our world has become postmodern.

Now, “postmodern” is a troubled word; indeed, some would say, a troubled word for a troubled and troubling idea. It is perhaps fitting that the meaning of “postmodern” should be imprecise and highly contested. Like some other adjectives—“feminist” and “liberal” come to mind—“postmodern” generates strong, visceral feelings in most who hear it. It can stand in for whatever one likes or dislikes about the world, for everything and nothing. In the aftermath of 9/11, for example, postmodernism was simultaneously criticized as unable to provide an ethical perspective adequate to permit condemnation of the terrorist attacks, and defended as providing the only plausible basis for such condemnation.¹⁰

Jean-François Lyotard is often credited—or blamed—for releasing the term “postmodern” from the confines of art and architecture into philosophy and the humanities.¹¹ With an admittedly “extreme simplification,” Lyotard defined “postmodern” as “incredulity towards *metanarratives*”¹²—that is, general accounts of human nature and history that purport to be independent of time, place, culture, and other contextual influences, and that determine how knowledge and truth

7 Gianni Vattimo, *Dialettica, Differenza, Pensiero Debole*, in *IL PENSIERO DEBOLE* 12 (Gianni Vattimo & Pier Aldo Rovatti eds., 1983), translated as Gianni Vattimo, *Dialectics, Difference, Weak Thought*, in *Weak Thought* 10 (Gianni Vattimo & Pier Aldo Rovatti eds., 2004) (trans. copyright Peter Carravetta 1996) (unpublished manuscript, on file with the DePaul Law Review).

8. Lyotard, *What Is Postmodernism?*, *supra* note 4, at 77

9. VATTIMO, *supra* note 2, at 5; see also GIANNI VATTIMO, *BELIEF* 82 (Luca D’Isanto & David Webb trans., 1999) (“The objective world order has fallen to pieces.”).

10. See generally, e.g., Steven Mailloux, *Contingent Universals: Religious Fundamentalism, Academic Postmodernism, and Public Intellectuals in the Aftermath of September 11*, 24 *CARDOZO L. REV.* 1583 (2003); Stanley Fish, *Postmodern Warfare*, *HARPERS MAG.*, July 2002, at 33.

11. See LYOTARD, *THE POSTMODERN CONDITION*, *supra* note 4. The Oxford English Dictionary (OED) places the first published use of “post-modern” in 1949, in an architectural context. Until 1980, most of the exemplary usages listed by the OED are architectural or artistic, and “postmodern” retains a meaning in those disciplines which is distinct from the meaning later given the term by the humanities. See IX *THE OXFORD ENGLISH DICTIONARY* 201 (2d ed. 1989).

The Postmodern Condition was published in French in 1979, and in English in 1984. See LYOTARD, *THE POSTMODERN CONDITION*, *supra* note 4.

12. LYOTARD, *THE POSTMODERN CONDITION*, *supra* note 4, at xxiv (emphasis added); see also *id.* at xxiii (giving as examples of metanarratives the “dialectics of the Spirit,” the “hermeneutics of meaning,” the “emancipation of the rational or working subject,” and the “creation of wealth”).

are constituted.¹³ I intend a similarly modest and oversimplified meaning. The advent of postmodernism marks the end of modernity, and a break with the universal myth of Enlightenment. Postmodernity recreates the cultural space for religion that was appropriated by Enlightenment modernism. The religion that properly and plausibly occupies this space, however, is radically different from the religion that modernism superseded.

“Enlightenment” was an optimistic attitude that expected reason and science to reveal the world “as it really is,” and anticipated that humanity could ultimately control that world.¹⁴ The knowledge spawned by Enlightenment would render the world predictable, while the technology enabled by Enlightenment knowledge would render the world controllable. With Enlightenment, it was anticipated that floods and fires, famine and drought, accident and disease, violence and war, would all be mitigated, diminished, and eventually eliminated by the forward march of scientific rationalism.

This Enlightenment idea, that the human race could progressively overcome the world, was not limited to physics and biology. By the nineteenth century, Enlightenment had migrated to the human or social sciences, promising human control of society as well as nature.¹⁵ In the nineteenth century, wrote Maurice Merleau-Ponty, science “was getting ready to *dominate* existence, theoretically and practically. Whether it was a question of technical or political action, men thought they would soon have access to the laws according to which nature and society *are constructed*, and govern both according to their principles.”¹⁶ Law and the humanities developed “sciences of interpretation,” which proposed to transform the process of ascertaining textual

13. See Fish, *supra* note 10, at 33, 34 (challenging the conception of objectively valid truth that presupposes a “standard of validity and value that is independent of any historically emergent and therefore revisable system of thought and practice,” and that enables moral condemnation “rooted in values, priorities, and a sense of right and wrong that *no one would dispute and everyone accepts*”); see also LUKACS, *supra* note 1, at 40 (“[B]ehind the employment of the ‘post-modern’ category we can detect the uneasy and long overdue recognition that such fixed categories as Objectivism, Scientism, Realism, Naturalism are now *passé*.”); Ashley Woodward, *Nihilism and the Postmodern in Vattimo’s Nietzsche*, 6 MINERVA. AN INTERNET J. PHIL. 51, 57 (2002), at <http://www.ul.ie/~philos> (“Postmodernity is generally thought to be characterized by the fragmentation of society into multiple, incommensurable forms of life,” none of which “can explain social reality as a whole.”).

14. See, e.g., Stanley Rosen, *Rethinking the Enlightenment*, COMMON KNOWLEDGE, Winter 1998, at 104, 105, 107–08.

15. See generally L.L. & J.S. Bernard, *A Century of Progress in the Social Sciences*, 11 SOC. FORCES 488 (1933) (relating how the influence of scientific method transformed law and history and spawned entirely new disciplines like sociology, economics, and political science).

16. MAURICE MERLEAU-PONTY, *Einstein and the Crisis of Reason*, in SIGNS 192, 192 (Richard C. McCleary trans., Northwestern Univ. Press 1964) (1960).

meaning from a quality of professional or aesthetic judgment into a more stable and systematic procedure.¹⁷ History became objective.¹⁸ Psychology opened the human mind to our rational interpretation.¹⁹ Economics promised to end the cycles of financial panic and depression with fiscal, monetary, and trade policy that could “fine-tune” the economy.²⁰ It seemed that there was virtually nothing in our world that could not be manipulated and controlled with a grounding in reason and science.²¹

More than a historical era, “Enlightenment” was an attitude—the attitude of the modern.²² The Oxford English Dictionary defines “modernity” as “[a]n intellectual tendency or social perspective characterized by departure from or repudiation of traditional ideas, doctrines, and cultural values in favour of contemporary or radical values (chiefly those of scientific rationalism and liberalism).”²³ Historically, the Enlightenment was a break with medieval Christianity—or, more precisely, a break with the preeminence of the medieval church as arbiter of truth and knowledge.²⁴ “At the core of the classical Enlightenment was a sense,” writes Steven Smith,

that the scholastic philosophy and religious culture inherited from the Middle Ages and the more unsettled intellectual culture of early modernity were not based on or oriented to truth. So eighteenth-

17. See, e.g., EMILIO BETTI, *TEORIA GENERALE DELLA INTERPRETAZIONE* (A. Giuffrè ed., 1955); FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (3d ed. 1880). For an account of this development, see Frederick Mark Gedicks, *Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation*, 50 *VAND. L. REV.* 613, 621–25 (1997).

18. See ERNST BREISACH, *ON THE FUTURE OF HISTORY* 119 (2003).

Two pillars upheld the traditional theory of truth: evidence and objectivity. The one delivered the crucial link to the past as once lived. The other aimed at negating the influence of life’s context on the historian. Together they held out the possibility of at least an approximation to a true account.

Id.

19. See generally, e.g., SIGMUND FREUD, *The History of the Psychoanalytic Movement*, in *THE BASIC WRITINGS OF SIGMUND FREUD* 933 (A.A. Brill trans. & ed., 1938).

20. See, e.g., JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1936).

21. See VATTIMO, *supra* note 2, at 75 (“[W]hat are Europe, the West, or modernity, if not above all the civilization of scientific, economic, and technological rationality?”).

22. See, e.g., Woodward, *supra* note 13, at 57 (“Modernity is typified by the setting into practice of the values of the Enlightenment project.”).

23. OED ONLINE, at http://dictionary.oed.com/cgi/entry/00313111?single=1&query_type=word&queryword=modernity&edition=3e&first=1&max_to_show=10 (last visited May 11, 2005); see also IX *THE OXFORD ENGLISH DICTIONARY*, *supra* note 11, at 948 (defining modernism as “[a] tendency or movement towards modifying traditional beliefs and doctrines in accordance with the findings of modern criticism and research; esp. a movement of this kind in the Roman Catholic Church at the beginning of the twentieth century”).

24. See BRIAN D. INGRAFFIA, *POSTMODERN THEORY AND BIBLICAL THEOLOGY* 2–3 (1995).

century thinkers “made a great point of having renounced the superstition and hocus-pocus of medieval Christian thought.”²⁵

Thus, Kant described Enlightenment as emergence from an intellectual immaturity that renders one unable to exercise one’s own judgment without guidance from someone else.²⁶ More recently, Max Horkheimer and Theodor Adorno, echoing Max Weber,²⁷ characterized Enlightenment as the “disenchantment of the world,” the “dissolution of myths and the substitution of knowledge for fancy.”²⁸

Although initially Enlightenment may have challenged only a certain kind of Christian thought,²⁹ it eventually came to signify a secular

25. Steven D. Smith, *Recovering (From) Enlightenment?*, 41 SAN DIEGO L. REV. 1263, 1270 (2004) (quoting CARL BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 29 (1932)).

26. IMMANUEL KANT, *What Is Enlightenment?*, in *PHILOSOPHICAL WRITINGS* 263, 263 (Ernst Behler ed., 1986).

27. See MAX WEBER, *Science as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 129, 155 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) [hereinafter *FROM MAX WEBER*] (positing that “[t]he fate of our times is characterized by rationalization and intellectualization and, above all, by the ‘disenchantment of the world’”).

28. MAX HORKHEIMER & THEODOR ADORNO, *DIALECTIC OF ENLIGHTENMENT* 3 (John Cumming trans., 1972).

29. See Smith, *supra* note 25. Smith draws a distinction between two historical modes of Enlightenment thought. The earlier “classical Enlightenment,” he argues, was generally committed to the idea that there exists a normative cosmic order whose essential character is discoverable and comprehensible by human beings properly trained in the exercise of reason:

If a proposition is true, it was supposed, then through reason all competent and honest people should in principle be able to apprehend its truth. And a moral or political proposition could be true, or false, because there was thought to be a Truth, or a “Nature,” that the proposition could correctly or incorrectly represent—in the same way that a proposition in physics or chemistry (about the movement of particles, or about cold fusion) can be true or false because there is a material reality that the proposition may or may not represent correctly.

See *id.* at 1295. The more contemporary “modern Enlightenment,” by contrast, demes either that such an order exists, or that its essential character is accessible to human beings (or both). See *id.* at 1282, 1296 (observing that in contemporary Western culture, and particularly in the academy, “the belief in a divinely-established normative order, widely shared in the eighteenth century, has by now come to seem at best highly sectarian,” and that unlike classical Enlightenment thinkers, “contemporary theorists describe the value of consensus not in terms of a test of truth, but rather in terms of political and social values such as fairness, civility, and cooperation”). Modern Enlightenment, according to Smith, almost perfectly inverts the ideas of classical Enlightenment:

Imposing labels anachronistically, we may today suppose that because the Enlightenment was supposed to have been a secular movement rebelling against a tradition that was religious, Enlightenment thinkers must have repudiated this belief in a providential order. But this supposition turns history on its head. Not only did the classical Enlightenment retain a faith in the existence of a normative cosmic order; the accomplishment of thinkers like Locke was precisely to subvert religious doctrines, such as the Calvinist doctrine of depravity, that had undermined confidence in the capacity of human beings to comprehend and conform to that overarching order.

See *id.* at 1275–76 (citation omitted). Similarly, George Marsden argues that the most influential modes of Enlightenment in the United States were the early “Moderate Enlightenment,” typi-

challenge to all of Christianity and, indeed, all religion.³⁰ As an attitude, Enlightenment is liberation, freedom from beliefs about the world that are grounded in nothing more than authority, tradition, or scripture—beliefs, in other words, whose truth or accuracy cannot be rationally or scientifically demonstrated.³¹

When Enlightenment displaced Christianity—when modernity displaced belief—religion was forced to a Hobson's choice. Theology could either adapt itself to modernity, by discarding the doctrines and beliefs which modernity had discredited, or it could reject modernity outright and migrate to the margins of public life, there to survive as the remnant of an irrelevant and discredited world view.³² For example, theological liberals in late-nineteenth century America sought to rescue evangelical Protestantism from the challenges of modernist thinking by abandoning literal-historical interpretations of the Bible in favor of metaphorical and figurative readings.³³ Conservatives, on

fied by Newton and Locke, and the "Didactic Enlightenment," typified by Adam Smith, both of which sought to reconcile belief with the emerging scientific order; by contrast, the "Skeptical Enlightenment" of Voltaire and Hume, which generally rejected religion in favor of scientific rationalism, was "discredited in many influential circles when [it] became associated with the French Revolution." See GEORGE M. MARSDEN, *UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM* 128–29 (1991).

30. See, e.g., KAREN ARMSTRONG, *THE BATTLE FOR GOD* 199 (2000) ("The astonishing achievements of scientific rationalism had made the very idea of God incredible and impossible for many Westernized people, since it had gone hand-in-hand with a suppression of the old mythical consciousness."); HANS-GEORG GADAMER, *TRUTH AND METHOD* 271–72 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1992) ("Enlightenment critique is primarily directed against the religious tradition of Christianity—i.e., the Bible."); IV MARTIN HEIDEGGER, *NIETZSCHE: NIHILISM* 99 (David Farrell Krell ed., Frank A. Capuzzi trans., 1982) ("Since the beginning of and throughout the modern age [Christianity] has continued to be that *against which* the new freedom—whether expressly or not—must be distinguished.").

31. See, e.g., ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 168–70 (1951) (arguing that, from the point of view of Enlightenment, the enemies of knowledge and faith were not skepticism and doubt, but the dogma and superstition of the church); GADAMER, *supra* note 30, at 272.

[I]n general, the Enlightenment tends to accept no authority and to decide everything before the judgment seat of reason. Thus the written tradition of Scripture, like any other historical document, can claim no absolute validity; the possible truth of the tradition depends on the credibility that reason accords it. It is not tradition but reason that constitutes the ultimate source of all authority.

Id., see also Rosen, *supra* note 14, at 105, 114 (attributing to the "Enlightenment in general the intention to substitute the paradigm of reason for that of faith, custom, or tradition," and using the term "Enlightenment" to "express all attempts, ancient or modern, to free the human race from tradition, custom, religion, and metaphysics, wherever these interfere with the accurate perception of the truth").

32. See MAX WEBER, *The Social Psychology of the World Religions*, in *FROM MAX WEBER*, *supra* note 27, at 267, 281–82.

33. MARSDEN, *supra* note 29, at 32–36; see also Robert D. Linder, *Changes in the Evangelical Protestant Understanding of Church and State During the Twentieth Century* 5 (2000) (unpublished manuscript, on file with the DePaul Law Review) ("Protestantism fragmented theologi-

the other hand, reacted to modernism by using government and law to defend the traditional understanding of the truth where they exercised political control, and by withdrawing from public life where they did not.³⁴

Both were losing strategies. Theological incorporation of modernity pushed one down the slippery slope of belief in a “God of the gaps,” an understanding of the relationship of religion and science that gave religion leave to explain only what science could not.³⁵ As science purported to explain more and more, religion was left with less and less, until at the bottom of this hill one could see the place where God might exist, but has nothing to do.³⁶ On the other hand, the choice of exile to private life would leave politics, government, education, and other aspects of public life in the hands of unbelief, touched by only a veneer of religious influence. Religious groups and individuals might speak and otherwise participate in public life, but only on condition that they cabined their religiosity. Religion might venture back from the margins, in other words, only so long as it dressed up—or down—in rationality.³⁷

Now we find that the Enlightenment that displaced Christianity, the attitude of modernity that displaced the attitude of belief, has itself been displaced. It is not that reason and science did not work; to the contrary, the last three centuries have seen an unprecedented increase in the world’s store of learning and our quality of life, and a remarkable technological enhancement of our ability to access that learning and enjoy that life. It is remarkably safe and inexpensive to travel,

cally in the century following 1850, under the hammer blows of Enlightenment rationalism and the theological liberalism it spawned.”). A similar shift occurred among European theologians during the eighteenth and nineteenth centuries. See generally, e.g., HANS FREI, *THE ECLIPSE OF BIBLICAL NARRATIVE: A STUDY IN EIGHTEENTH CENTURY HERMENEUTICS* (1974) (describing how the European understanding of the Bible was transformed by modernity from the sole account of literal-historical events, to one of several reliable accounts of literal-historical events, to a mere expression of ancient cultural beliefs and practices with little connection to literal-historical events).

34. See MARSDEN, *supra* note 29, at 67

35. See C.A. COULSON, *SCIENCE AND CHRISTIAN BELIEF* 19 (1955) (“It has always been one of our major temptations to try to divide our experience into two (or more) parts and grant science control of the one part, while allowing religion to maintain its authority in the other.”).

36. See *id.* at 20 (“There is no ‘God of the gaps’ to take over at those strategic places where science fails; and the reason is that gaps of this sort have the unpreventable habit of shrinking.”).

37. See, e.g., Smith, *supra* note 25, at 1298 (arguing that Rawls’s concession that citizens may properly make religious arguments in public life—so long as such arguments are eventually supported by “public reason”—amounts to “telling citizens that on the most important public issues it is permissible to express views about religion, or Truth, only on the condition that the final decision does not depend on those views”).

even after 9/11.³⁸ The telecommunications revolution has brought knowledge about anything and everything literally to our fingertips. Free market capitalism and liberal democracy—perhaps the crowning achievements of Enlightenment in the West—have created unimagined prosperity and freedom.

Nevertheless, it remains that Enlightenment has failed its promise. After centuries of science, we still do not control our world. Science and technology have generated more—and more dangerous—problems than the ones they purported to solve. Industrialization brought us more and cheaper goods and services, but also exploitation of labor—including the exploitation of women and children—and the destructive threats to self, family, and community that seem always to accompany it.³⁹ Economic policy moderated the business cycle, but not the devastation of financial loss; in place of bank failures and price collapses, ordinary people now see their jobs and savings erased by fraud, speculation, mergers, and outsourcing.⁴⁰ Atomic research ended World War II and harnessed a source of potentially unlimited energy, but in the shadow of mass human and environmental destruction.⁴¹ Slavery is formally outlawed throughout the world, yet

38. See Paul Burnham Finney, *Fear of Flying? Think Again. It's Gotten Safer.*, N.Y. TIMES, Nov. 30, 2004, at C8; Gene Sloan, *The World Is Looking Wide Open*, USA TODAY, Jan. 7, 2005, at 1D.

39. See, e.g., UPTON SINCLAIR, *THE JUNGLE* (Bantam Classic ed. 1981) (1905) (describing brutal worker conditions in the Chicago meatpacking industry during the early 1920s); David Barstow & Lowell Bergman, *A Workplace in Turmoil: At a Texas Foundry, An Indifference to Life*, N.Y. TIMES, Jan. 8, 2003, at A1; David Barstow & Lowell Bergman, *A Secretive Dynasty: A Family's Fortune, A Legacy of Blood and Tears*, N.Y. TIMES, Jan. 9, 2003, at A1; David Barstow & Lowell Bergman, *Failures of Regulation: Deaths on the Job, Slaps on the Wrist*, N.Y. TIMES, Jan. 10, 2003, at A1. These *New York Times* articles by Barstow and Bergman were part of an investigative series, entitled *Dangerous Business*, that detailed how foundry and pipe-fitting company McWane, Inc. intentionally violates worker health, safety, compensation, and environmental laws and regulations without significant criminal and regulatory penalties despite an extraordinary rate of employee injury and numerous employee deaths.

40. See, e.g., JUSTIN O'BRIEN, *WALL STREET ON TRIAL. A CORRUPTED STATE?* (2003) (relating how deregulation of securities markets and financial services facilitated the commission of fraud by public companies and investment banks resulting in tens of billions of dollars of public investor losses); Andrew Pollack, *Medical Firms Join the Trend to Outsourcing*, N.Y. TIMES, Feb. 24, 2005, at A1 (reporting the export of medical technology jobs from the United States to India and China); Ben White & Carrie Johnson, *Investor Paybacks Small and Slow: Distributing Money to Compensate Burned Buyers Requires Complex Calculations*, WASH. POST, May 15, 2004, at E1 (reporting on the delays and difficulties involved in distributing to defrauded investors funds generated by settlement of civil fraud actions against public companies and investment banking firms). See generally ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

41. See, e.g., MICHELE STENEHIEM GERBER, *ON THE HOME FRONT: THE COLD WAR LEGACY OF THE HANFORD NUCLEAR SITE* (2d ed. 2002) (documenting the disastrous environmental effects of the military's weapons-grade plutonium production at Hanford, Washington); ADRIANA PETRYNA, *LIFE EXPOSED: BIOLOGICAL CITIZENS AFTER CHERNOBYL* (2002) (analyzing the dev-

trafficking in human beings continues—and again, especially trafficking in women and children.⁴² The telecommunications revolution has indeed brought the world to our doorstep, including fraud and filth that threaten our peace and privacy.⁴³ Though we may retain a faith in the Enlightenment “project”—the use of reason, science, and technology to eliminate or ameliorate the world’s problems—we nonetheless have a more chastened and modest appraisal of what reason, science, and technology might realistically be expected to accomplish.

Postmodernity is the end of Enlightenment. It is the end of modernity’s promise of an objective understanding of the world that would enable our control of it. History and the social sciences have laid aside their pretense to objectivity and universality.⁴⁴ It is now an old joke that if you “torture statistics long enough . . . they will confess to anything.”⁴⁵ Even the physical sciences—once known as the “hard sciences” because of the apparent stability of their objects of study—are now conceded to be influenced to some extent by human discourse, and not solely by the objective properties of the things scientists investigate.⁴⁶ Werner Heisenberg, for example, maintained that “[n]atural science does not simply describe and explain nature; it is a

astating political, scientific, and social consequences of the nuclear reactor explosion in Chernobyl, Ukraine in 1986); ERNEST STERNGLASS, *SECRET FALLOUT: LOW-LEVEL RADIATION FROM HIROSHIMA TO THREE-MILE ISLAND* (1981) (documenting health consequences of exposure to low-level radiation caused by atomic weapons, atomic tests, and nuclear-powered reactors).

42. See, e.g., Nicholas D. Kristof, *Cambodia, Where Sex Traffickers Are King*, N.Y. TIMES, Jan. 15, 2005, at A15 (describing the sexual trafficking of Cambodian girls); Norimitsu Onishi, *Japan, Easygoing Till Now, Plans Sex Traffic Crackdown*, N.Y. TIMES, Feb. 16, 2005, at A3 (reporting on the sexual trafficking of Chinese, Columbian, Filipino, and Thai women in Japan); Michael Powell, *Child Porn Operation Busted, FBI Says; Web Sites Based in Belarus, Latvia*, WASH. POST, Jan. 16, 2004, at A3 (describing the sexual exploitation of children to create child pornography).

43. Brian Krebs, *Despite Efforts to Contain Them, “Phishing” Scams Spread*, WASH. POST, Jan. 19, 2005, at E5 (describing the proliferation of fraudulent e-mail solicitations designed to obtain credit card numbers, to charge purchases thereon, and to convert such charges into cash); Powell, *supra* note 42 (reporting the breakup of a child pornography ring which generated 270,000 Internet credit card transactions (100,000 originating in the United States) for child pornography sold on the World Wide Web).

44. See generally, e.g., BREISACH, *supra* note 18; GEORG G. IGGERS, *HISTORIOGRAPHY IN THE TWENTIETH CENTURY* (1997); PETER NOVICK ET AL., *THAT NOBLE DREAM* (1988).

45. See, e.g., Gregg Easterbrook, *Easterblog*, THE NEW REPUBLIC ONLINE (Apr. 13, 2004), at www.tnr.com/easterbrook.mhtml?pid=1554 (last visited Oct. 11, 2004); see also The Quote Garden, at <http://www.quote-garden.com/statistics.html> (last visited Mar. 22, 2005) (“There are three kinds of lies—lies, damned lies, and statistics.”) (dubiously attributed to Benjamin Disraeli by Mark Twain).

46. See generally, e.g., ROBERT P. CREASE, *THE PLAY OF NATURE* (1993); HANS GEORG GADAMER, *REASON IN THE AGE OF SCIENCE* (Frederick G. Lawrence trans., 1981); THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); see also MARTIN HEIDEGGER, *BASIC QUESTIONS OF PHILOSOPHY* 48–49 (Richard Rojcewicz & André Schuwer trans., 1994) (1984).

part of the interplay between nature and ourselves; it describes nature as exposed to our method of questioning."⁴⁷

In short, postmodernism is a decisive rejection of modernity's myth of progress, breakthrough, and renewal.⁴⁸ Postmodernism suggests, instead, a "disenchantment that is final,"⁴⁹ and further "a radical disenchantment with the idea of disenchantment itself," which recognizes "that even the ideal of the elimination of myth is a myth."⁵⁰

The displacement of modernity by postmodernity has been an ambiguous blessing for religion. To be sure, it has reopened space for religious belief that previously had been almost entirely and aggressively filled by reason and science. Religion need no longer confine itself to the gaps in our knowledge that reason and science cannot fill, because many of their purportedly universal explanations turn out to be local.⁵¹ Nor must religion live at the margins of public life as the vestige of a world view rejected by scientific rationalism, because the displacement of Enlightenment necessarily entails the displacement of reason and science as privileged arbiters of truth and knowledge.⁵² "[N]ot everything in reality," wrote Paul Tillich, "can be grasped by the language which is most adequate for mathematical sciences."⁵³ In short, one can once again speak in polite society of belief as a way of knowing and a guide for how to live.⁵⁴

A historical reflection on the foundations of modern natural science will perceive that the much-acclaimed facts, which modern experimental science accepts as the sole reality, become visible as facts and can be founded only in light of a wholly determined metaphysics of nature, a metaphysics that is not less operative because contemporary scientists are no longer acquainted with it. [T]he most acute crisis of today's science might consist precisely in having no suspicion of the crisis in which it is involved

Id. As Heidegger intimates, scientists themselves, as opposed to philosophers and historians of science, still generally adhere to a modernist conception of their activities. See, e.g., STEVEN WEINBERG, *FACING UP* (2001).

47. WERNER HEISENBERG, *PHYSICS AND PHILOSOPHY* 81 (1958).

48. See, e.g., ARMSTRONG, *supra* note 30, at 367 ("At the end of the twentieth century, the liberal myth that humanity is progressing to an ever more enlightened and tolerant state looks as fantastic as any of the other millenarian myths.").

49. Geoffrey Hartman, *Transparency Reconsidered: On Postmodernism, Fundamentalism, and Other Dark Matters*, 24 *CARDOZO L. REV.* 1569, 1569 (2003) (arguing that "Postmodern" suggests a disenchantment that is final. The period concept of modernity as breakthrough and decisive renewal seems to have lured us once too often.").

50. VATTIMO, *supra* note 9, at 29.

51. *Id.* ("The untenability of scientific and historicist rationalism—both of which repudiated the very possibility of religion—has been widely accepted as a given in our culture."); *id.* at 67 ("[H]aving left behind the metaphysical claim to objectivity, today none should be able to say, 'God does not exist.'").

52. For development of this argument, see Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 *V.A. L. REV.* 671 (1992).

53. PAUL TILlich, *THEOLOGY OF CULTURE* 54 (Robert Kimball ed., 1978).

54. See VATTIMO, *supra* note 9, at 28.

Ideas regularly reappear in the cycles of history, but they are rarely the same the second time around. Resurrection is not total, renewal rarely full, and restoration almost never complete. Both Christianity and Enlightenment, belief and modernity, are grand universal accounts—"metanarratives," to use Lyotard's term⁵⁵—that "claimed to grasp the true structure of reality, the laws of history, and the method for acquiring knowledge about the only 'truth.'"⁵⁶ Though it is the failure of modernity that has brought us to postmodernity, postmodernity rejects all universal narratives, not just those of modernity. The displacement of Christianity by Enlightenment was the substitution of one universal narrative for another; postmodernism, however, not only offers no new universal narrative in place of modernity, it also denies the possibility of any such narrative—that is, it denies the possibility of any universally accepted and acceptable account of the world and humanity's place in it.⁵⁷

The irony of religion in a postmodern age is that postmodernism opens the space for radical religious pluralism by denying the possibility of metanarratives, while each religion from its own particular perspective may understand its beliefs as the metanarrative that properly applies to the entire world. As Vattimo describes the problem, the "return of religion seems . . . to depend on the dissolution of metaphysics," that is, on the rejection of all doctrines which claim to render a true and singular description of reality.⁵⁸ Yet, "the renewal of relig-

55. See *supra* text accompanying note 12. Of course, even during their metanarrative heydays, Christianity and Enlightenment were only thought "universal" from the perspective of the West.

56. VATTIMO, *supra* note 2, at 86.

57. Following Heidegger, Vattimo argues that this is the meaning of Nietzsche's declaration of the death of God. According to Vattimo, "God is dead" does not signify an assertion that there is no God, but rather that there exists no metaphysical foundation that enables the objective demonstration of the essential nature of truth or reality:

"God is dead" means nothing else than the fact that there is no ultimate foundation.

An analogous meaning, albeit unacknowledged, is found in Heidegger's polemics against metaphysics—the whole European philosophical tradition from Parmenides on—which believes itself capable of grasping the ultimate foundation of reality in the form of an objective structure like an essence or a mathematical truth, which is given outside of time.

VATTIMO, *supra* note 2, at 3 (discussing FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* §§ 108, 125, at 167, 181 (Walter Kaufmann trans., 1974)); see also Vattimo, *Weak Thought*, *supra* note 7, at 15.

This relation of overcoming and distortion [in metaphysics] is already exemplified in Nietzsche's announcement that God is dead, which is *not* a metaphysical utterance on the nonexistence of God. The statement is intended to take active account of an event, since the death of God means mainly the end of the stable structure of being, hence also the end of the possibility of pronouncing God's existence or nonexistence.

Id. Although Vattimo's reading of Heidegger is uncontroversial, it is not clear that Heidegger's reading of Nietzsche is. See, e.g., INGRAFFIA, *supra* note 24, at 24–32 (disputing the Heideggerian reading).

58. VATTIMO, *supra* note 2, at 18–19.

ion configures itself necessarily as the claim to an ultimate truth," which challenges the very plurality of world views that is brought into being by the dissolution of metaphysics.⁵⁹

The "religion" that can properly return at the end of modernity, then, is *not* the religion inscribed in the Christian narrative of premodernity, and thus does not really "return" at all. The religion displaced by Enlightenment was a totalizing metanarrative, the unity of society under the umbrella of the one true Christian church.⁶⁰ Today, we would call such religion "fundamentalist," based on its self-confident certainty that its knowledge of the Truth justifies the use of government power to persuade all people to submit to it.⁶¹ Postmodernism's rejection of all such accounts, however, means that religion may return from the margins, but only as a partial, local, and unprivileged account of our place in the world, rather than the one true account of that place. This understanding of religion resonates with what contemporary sociologists call "spirituality," an increasingly common attitude of self-discovery through which one gives meaning to life by adopting only those religious images and interpretations that seem relevant and important to that individual.⁶² Religion finds itself the object of renewal and rediscovery at the end of modernity, but only because postmodernism has dethroned Enlightenment, along with all other metanarratives.

How, then, is "religion" constituted in American constitutional law at the end of our age, the end of modernity? The development of the doctrine of religious liberty through American constitutional history mirrors the displacement of belief by modernity, and modernity by post-modernity.⁶³ The two competing conceptions of belief, spirituality and fundamentalism, are now vying for the space that formerly was the exclusive domain of reason and science.⁶⁴ Although for now the constitutional understanding of religious liberty is organized around this relationship,⁶⁵ this dialectic is not stable because spirituality, not fundamentalism, is the mode of religion better suited for our times.⁶⁶

59. *Id.* at 19.

60. See 1 ERNST TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 246-56 (Olive Wyon trans., 1976) (1911) (arguing that fortuitous social, economic, and political conditions enabled a "Christian unity of civilization" during the Middle Ages).

61. See *infra* Part III.B.

62. See *infra* Part III.A.

63. See *infra* Part II.

64. See *infra* Part III.

65. See *infra* Part IV.

66. See *infra* Parts V, VI.

II. RELIGION CLAUSE HISTORY

The earliest interpretations of the Religion Clauses by the Supreme Court came in the *Mormon Polygamy Cases* of the late nineteenth century, in which the Court repeatedly upheld anti-bigamy laws, both on their face and as applied to members of The Church of Jesus Christ of Latter-day Saints, who were obeying what they believed was a divine commandment.⁶⁷ Not generally viewed as among the Court's finest moments, the *Mormon Polygamy Cases* are nevertheless consistent with both the historical understanding of the Free Exercise Clause,⁶⁸ and contemporary doctrine developed by the Supreme Court,⁶⁹ neither of which supports a reading of the Free Exercise Clause that requires believers to be relieved of incidental burdens on their beliefs and practices. There was an interlude in the late twentieth century during which the Court held that religious individuals and groups were indeed constitutionally entitled to be excused from obeying laws that burdened their religious beliefs or interfered with their religious practices,⁷⁰ but the Court abandoned this "religious exemption" doc-

67. *Late Corp. of The Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Reynolds v. United States*, 98 U.S. 145 (1878).

68. Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that during the late eighteenth century, Americans did not understand the Free Exercise Clause to require that believers be exempted from laws that burden their religious beliefs or practices); Marci A. Hamilton, *Religion, The Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POL. 387 (2002) (arguing that American Protestant clergy during the late eighteenth century believed that the common good required that religious beliefs and practices conform to properly enacted law). Judge McConnell has provided the most detailed account of the historical basis for religious exemptions, but even he concluded that constitutionally compelled exemptions for believers were only one of several plausible interpretations of the Free Exercise Clause. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV L. REV. 1409 (1990); see also *City of Boerne v. Flores*, 521 U.S. 507, 537–38 (1997) (Scalia, J., concurring) (arguing that the "extravagant" claim that *Smith's* rejection of constitutionally compelled exemptions is historically unfounded is contradicted by McConnell's conclusion that constitutionally compelled exemptions from generally applicable laws were merely "within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause" (alteration in original) (quoting McConnell, *supra*, at 1415)).

69. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 877–80, 882, 884–85 (1990).

70. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (excusing the Amish from a state compulsory school attendance law); *Sherbert v. Verner*, 374 U.S. 398 (1963) (ordering the state to pay unemployment compensation to a Seventh-Day Adventist who by state law had been rendered ineligible for unemployment compensation because she had refused to take a job that would have required her to work on Saturdays (the Seventh-Day Adventists' Sabbath)). Even during the reign of the *Sherbert-Yoder* doctrine, the Court nearly always sided with the government against believers seeking exemptions. FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* 98–99 (1995) (observing that the religious exemption doctrine was never extended beyond the narrow facts of the cases that established it).

trine in 1990.⁷¹ The law since then is clear, if still controversial: The Free Exercise Clause does not afford religious individuals and groups special protection against incidental burdens on their beliefs and practices, but protects only against intentional religious discrimination.⁷² Just as nineteenth century Latter-day Saints could claim no constitutional dispensation from complying with traditional laws that mandated monogamy, so believers today must also comply with laws that burden their religious beliefs and practices, unless they can prove that the burden is the result of intentional religious discrimination.⁷³

A similar transformation has occurred in Establishment Clause doctrine. The principle of religious nondiscrimination constitutionalized by *Employment Division v. Smith*⁷⁴ now animates the Establishment Clause as well.⁷⁵ When the Court first began to interpret the Establishment Clause in the 1940s, it treated religion as a distinctive and even aberrant practice in a secular democracy, one that was accordingly subject to distinctive burdens. Religion, it was thought, needed to be constitutionally separated from public life, and discriminatory burdens on religious beliefs and practices were justified precisely on the ground that they were necessary in order to preserve political freedom.⁷⁶

71. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

72. See *id.* at 879 (“The right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).’” (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))); see also *City of Boerne v. Flores*, 521 U.S. 507, 512–16 (1997) and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (affirming and defending the basic holding of *Smith*).

73. See GEDICKS, *supra* note 70, at 108 (observing that *Smith* “brought free exercise jurisprudence full circle” by resurrecting *Reynolds*).

74. 494 U.S. 872 (1990).

75. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947) (describing the persecutions of Reformation Europe and colonial American that purportedly inspired the Establishment Clause); see also GEDICKS, *supra* note 70, at 19–21 (*Everson* initiated a doctrinal regime of “secular neutrality” that requires that “government remain detached and neutral with respect to the religious choices of its citizens,” and implies that a “wholly secular society is possible and perhaps even preferable.”); Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 83 (positing that “government action concerning religion is particularly likely to be judged unconstitutional by the courts”). See generally PHILLIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002) (giving a detailed history of the origin and development of separationism); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 284–327 (2001) (describing the various secular, nativist, and sectarian impulses in American culture that coalesced into separationism).

76. See, e.g., *Everson*, 330 U.S. at 15 (“The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.” (quoting *Watson v. Jones*, 80 U.S. 679, 731 (1872))).

Beginning in the 1980s, however, the Supreme Court began to abandon separationism, relying instead on viewpoint- and content-neutrality doctrines imported from the Free Speech Clause.⁷⁷ The Court held repeatedly that government could not discriminate against speech in public forums on the basis of religious viewpoint or content.⁷⁸ It was not long before the Court extended this religious non-discrimination principle to programs of government aid.⁷⁹ It is now the law that religious organizations may not be precluded from receiving government assistance simply because of their religious character, albeit with two qualifications: Religious organizations must meet all secular requirements, and the decision whether any particular organization receives government assistance must be made by private individuals rather than government officials.⁸⁰ So long as these conditions are met, churches and religious groups cannot be excluded from programs of government assistance.

As the doctrinal momentum of religious nondiscrimination accelerated into the 1990s, it appeared that neutrality and nondiscrimination would eventually overtake all of Religion Clause doctrine, fully eclipsing separationism.⁸¹ Yet what was expected never occurred. Significant areas of church-state relations remain subject to separationist doctrine, including church-state interactions that involve government

77 For an account of this development, see Frederick Mark Gedicks, *Neutrality in Establishment Clause Interpretation: Its Past and Future*, in *CHURCH-STATE RELATIONS IN CRISIS* 191 (Stephen V. Monsma ed., 2002).

78. *Good News Club v. Milford Ctr. Sch. Dist.*, 533 U.S. 98, 107 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842–46 (1995); *Lamb's Chapel v. Ctr. Morches Union Free Sch. Dist.*, 508 U.S. 384, 396–97 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248–49 (1990); *Widmar v. Vincent*, 454 U.S. 263, 274–75 (1981).

79. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 649–653 (2002) (upholding elementary and secondary school tuition voucher plan that included religious schools as eligible participants); *Mitchell v. Helms*, 530 U.S. 793, 809–14 (2000) (upholding government lending of equipment to public and private elementary and secondary schools); *Agostini v. Felton*, 521 U.S. 203, 230–32 (1997) (upholding provision of remedial education, guidance, and job counseling services by public school employees to low-income students attending private elementary and secondary schools); *Zobrest v. Catalina Hills Sch. Dist.*, 509 U.S. 1, 8–10 (1993) (upholding government provision of sign language interpreter to a deaf student attending Roman Catholic high school); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 485–89 (1986) (upholding state payment of vocational rehabilitation grant on behalf of blind recipient studying for ministry at Bible college); *Mueller v. Allen*, 463 U.S. 388, 397–99 (1983) (upholding tax deduction for tuition, textbook, and transportation expenses incurred in sending a child to public or private elementary or secondary school).

80. See Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1101 (2002); see, e.g., *Zelman*, 536 U.S. at 649–55; *Mitchell*, 530 U.S. at 809–12 (plurality opinion).

81. See, e.g., Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 246–47 (1992).

participation in religious worship and speech,⁸² internal disputes among the members of churches and other religious groups,⁸³ the delegation of government power to churches and other religious groups,⁸⁴ and state pursuit of a stricter separation of church and state than is required by the federal Establishment Clause.⁸⁵

The constitutional history of Religion Clause doctrine can be read as a more recent and compact parallel to the metaphysical decline of the West—that is, the progressive shift from the Christian narrative which organized government and society on belief, to the Enlightenment narrative founded on progress and emancipation, to the postmodern dialectic of spirituality and fundamentalism. Far more went on in the *Mormon Polygamy Cases*, for example, than simple affirmation that the Free Exercise Clause did not protect against incidental burdens.⁸⁶ The anti-bigamy laws enforced against Latter-day Saint polygamists were grounded in Protestant beliefs about the true and essential nature of marriage, an issue that resonates over the decades to our day. Polygamy is described as a barbaric, uncivilized and, most notably, *unChristian* practice;⁸⁷ by contrast, monogamous marriage—the “union for life of one man and one woman in the holy

82. See *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding unconstitutional student-led prayers at public high school football games); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding unconstitutional prayers at public school graduation ceremonies); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding unconstitutional a state statute encouraging voluntary prayer in public schools); *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (holding unconstitutional Bible reading during public school opening exercises); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding unconstitutional a program of daily prayer recitation in public school classrooms).

83. See *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *But see Jones v. Wolf*, 443 U.S. 595 (1979) (holding that courts may adjudicate such disputes when they can do so on the basis of religiously neutral principles of law).

84. See *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (holding that a statute impermissibly delegated government authority where the statute created a school district along geographic lines correlated with religious affiliation); *Larkin v. Grendel's Den*, 459 U.S. 116, 123–27 (1982) (striking down a statute that permitted a church or school to veto the liquor license applications of establishments located within 500 feet of the church or school).

85. See *Locke v. Davey*, 540 U.S. 712, 718 (2004) (holding that a state may exclude pastoral courses of study from a state scholarship program even when such exclusion is not mandated by the Establishment Clause).

86. For instance, it is far from clear that the anti-bigamy laws deployed against the Latter-day Saints imposed burdens on plural marriage that were, in fact, merely incidental rather than intentional and discriminatory.

87. *E.g.*, *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 48–49 (1890) (describing polygamy as “abhorrent to the sentiments and feelings of the civilized world,” a “barbarous practice,” and “contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world”); *Davis v. Beason*, 133 U.S. 333, 341 (1890) (“Bigamy and polygamy are crimes by the laws of all civilized and Christian

estate of matrimony”—is characterized as “the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.”⁸⁸ Confident that it knew God’s design for marriage, the Court did not hesitate to confirm the constitutional validity of the federal government’s interventions against the Mormon church, interventions that eventually brought the church to the brink of extinction and forced it to abandon the practice of a central theological precept as the price of survival.⁸⁹

Of course, the Mormons were by no means the only religious minorities to suffer from government enforcement of a singular view of truth and reality. Jehovah’s Witnesses and Roman Catholics suffered persecutions well into the twentieth century, to say nothing of the burdens heaped upon Jews, Muslims, Buddhists, and other practitioners of minority religions.⁹⁰

Mark De Wolfe Howe described the relationship between American government and Protestant religion during the late nineteenth and early twentieth centuries as a “de facto Protestant establishment.”⁹¹ Although no denomination was formally established as a national or state church, Protestant theology was understood to constitute one of the pillars of a civilized republican society. Thus, federal and state governments legislated a broad range of Protestant beliefs and practices, such as: Requiring public school students to read from the King James Bible; sponsoring group prayer in state legislatures and public schools; recognizing Thanksgiving, Christmas, and Easter as official holidays; providing for expressions of allegiance to the Almighty on coins, stamps, and government seals; enacting temperance and anti-evolution laws; and generally imposing civil and social disabilities on

countries.”); *id.* at 341–42 (“To call [the] advocacy [of bigamy and polygamy] a tenet of religion is to offend the common sense of mankind.”).

88. *Davis*, 133 U.S. at 345; *accord* *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

89. See generally Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992).

90. See EDWIN S. GAUSTAD, *RELIGIOUS HISTORY OF AMERICA* 273–75, 352 (2002) (describing the persecution of Catholics, Jews, and Jehovah’s Witnesses); *MINORITY FAITHS AND THE AMERICAN PROTESTANT MAINSTREAM* (Jonathan D. Sarna ed., 1998) (a collection of papers on the experiences of members of minority faiths in America, particularly Jews, Catholics, Mormons, and African-American Protestants); GUSTAVUS MYERS, *HISTORY OF BIGOTRY IN THE UNITED STATES* (Henry M. Christman ed. & rev., 1960) (cataloguing religiously motivated persecution in America through the 1960s, particularly against Catholics, Jews, Masons, and Mormons); SHAWN FRANCIS PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* (2000) (narrating the persecution of Jehovah’s Witnesses, particularly in the mid-twentieth century, and arguing that their resistance helped to bring about many of the religious and civil liberties we enjoy today).

91. See generally MARK DE WOLFE HOWE, *THE GARDEN AND THE WILDERNESS* (1965).

non-Protestants and (especially) nonbelievers.⁹² Although religious nonconformity was tolerated, this toleration extended only as far as nonconforming beliefs and practices did not threaten the Protestant morality on which civilized republican government was presumed to rest.⁹³ As the Supreme Court declared at the height of the de facto establishment, Christianity—by which it meant *Protestant* Christianity—forms part of the common law, and the United States is thus “a Christian nation.”⁹⁴

Religion Clause doctrine shed the Christian narrative in the 1940s with a burst of historically dubious rhetoric which recharacterized religion from the necessary social foundation of the good and the true, to an inherently persecutorial and destabilizing influence that threatened social and political stability. In the first Establishment Clause decision of the modern era, the Court described the period prior to American colonization as

filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. . . . In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.⁹⁵

The Court referred to religious dissenters in the colonies themselves who were forced “to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.”⁹⁶ This rhetorical image of religion as a threat to the social order and to the advancement of knowledge recurred into the 1980s.⁹⁷

This image of religion is embedded in the narrative of Enlightenment—of disenchantment and demythification, neutrality and objectivity—in which secular knowledge is the preeminent discourse of calm rationality, and religion is a destabilizing superstition that must

92. See GEDICKS, *supra* note 70, at 16.

93. See David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1070–71 (1991) (“[A]n interdenominational Protestantism was both culturally, and in a certain sense, legally, dominant, even as those of other faiths were allowed to practice their faith within the constraints of civil law.”).

94. *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

95. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947).

96. *Id.* at 10.

97. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

be kept out of government and other avenues of public life.⁹⁸ For the next four decades, virtually all forms of government assistance to religion were read through the lenses of suspicion and fear that religion would capture government power.⁹⁹ Religious practice was protected by the exemption doctrine, just as the liberal state generally protects all dissenting ideologies, but religion itself is not credited as a source of useful knowledge.

III. RELIGIOUS BELIEF

Two competing conceptions of belief, “spirituality” and “fundamentalism,” are now vying for the public space that previously was the exclusive domain of reason and science.

A. Spirituality

In a monograph provocatively entitled *Spiritual, But Not Religious*, Robert Fuller defined “spirituality” as the attitude of one struggling to understand how his or her life relates to a greater cosmic scheme.¹⁰⁰ According to Fuller, “We encounter spiritual issues every time we wonder where the universe comes from, why we are here, or what happens when we die,” as well as when we are “moved by values such as beauty, love, or creativity that seem to reveal a meaning or power beyond our visible world.”¹⁰¹ Fuller argued that “[a]n idea or practice is ‘spiritual’ when it reveals our personal desire to establish a felt-relationship with the deepest meanings or powers governing life.”¹⁰²

A noteworthy dimension of the new spirituality is its loose denominational and creedal character. Spirituality capitalizes on the declining number of Americans who practice their religion in strict

98. See GEDICKS, *supra* note 70, at 34 (referring to secularism’s “nightmare of particularist religious beliefs subverting public life—the imposition of values by the irrational, passionate, and violent overthrow of rationality, reason, and peace”).

99. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971).

It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution’s authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion’s intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

Id. See generally Jeffries & Ryan, *supra* note 75, at 284–90 (summarizing decisions from this period).

100. ROBERT C. FULLER, *SPIRITUAL, BUT NOT RELIGIOUS* 8 (2001).

101. *Id.* at 8–9.

102. *Id.* at 9.

accordance with the teachings and doctrines of a traditional denomination.¹⁰³ Many believers see the catechisms and other theological boundaries of denominational religion as obstacles to personal quests for spiritual meaning.¹⁰⁴ As Fuller suggests, they describe themselves as “spiritual,” but not “religious.”¹⁰⁵ Fuller estimates that as many as one in five Americans may fit this description.¹⁰⁶ If accurate, this figure would mean that there are nearly as many spiritually “un-churched” people in the United States as there are members of any single denomination.¹⁰⁷

The influence of the new spirituality is not confined to the un-churched, but has reached into denominational religion to alter the relationship of church members to their churches. Those who retain a denominational affiliation are increasingly shifting their religious commitment away from strict adherence to the beliefs and practices of their denomination in the direction of personal spirituality.¹⁰⁸ In other words, religion is becoming consumerized. Many religious Americans now “shop” for a church to attend like they do for consumer goods, choosing one because of the individual needs and preferences that it satisfies, rather than the truth of the doctrines it teaches.¹⁰⁹ Related and growing phenomena are so-called “cafeteria”

103. See, e.g., Peter L. Berger, *Reflections on the Sociology of Religion Today*, 62 SOC. RELIGION 443, 446, 447 (2001) (noting the “declining number of people who profess traditional religious beliefs,” and who define and practice “their religiosity in nontraditional, individualized and institutionally loose ways”); see also BARBARA HARGROVE, *THE SOCIOLOGY OF RELIGION* 126–27 (1979) (observing that ecumenicism was the first response of Christianity to post-Christian religious pluralism); Charles Trueheart, *Welcome to the Next Church*, THE ATLANTIC MONTHLY, Aug. 1996, at 37 (Trueheart conceptualizes the decline:

No spires. No crosses. No robes. No clerical collars. No hard pews. No kneelers. No biblical gobbledygook. No prayerly rote. No fire, no brimstone. No pipe organs. No dreary eighteenth-century hymns. No forced solemnity. No Sunday finery. No collection plates.

This list has asterisks and exceptions, but its meaning is clear. Centuries of European tradition and Christian habit are deliberately being abandoned, clearing the way for new, contemporary forms of worship and belonging.

Id.

104. FULLER, *supra* note 100, at 4.

105. See *supra* note 100 and accompanying text; accord Berger, *supra* note 103, at 448.

106. FULLER, *supra* note 100, at 1, 4–5.

107. See ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION* 183 (2003).

108. This is Fuller’s thesis. See FULLER, *supra* note 100, at 9.

109. Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and its Importance to the Law*, 51 BUFF. L. REV. 127, 164 (2003).

Shopping for a new church, temple, or religious affiliation is now commonplace. In the United States, a family that moves to a new town commonly shops around for the church or other religious institution that suits them best. A person might be raised Catholic, not participate in any organized religion for several years, spend a few months in a Zen monastery, and then join the local Baptist church when she settles down and marries. After ten years, when her family is relocated to another part of the country, it

or “grocery cart” religion, terms which capture the practice of picking and choosing which of the doctrines and practices of a denomination one will observe, sometimes assembling personalized collections of beliefs and practices from among the teachings and doctrines of diverse and antagonistic denominations and traditions.¹¹⁰ Charles Taylor has succinctly captured this bewildering growth of “intermediate positions” between atheism and orthodox belief in the United States and other Western nations:

[M]any people drop out of active practice while still declaring themselves as belonging to some confession or believing in God. On another dimension, . . . a wider range of people express religious beliefs that move outside Christian orthodoxy. Following in this line is the growth of non-Christian religions, particularly those originating in the Orient, and the proliferation of New Age modes of practice, of views that bridge the humanist/spiritual boundary, of practices that link spirituality and therapy. On top of this, more and more people adopt what would earlier have been seen as untenable positions; for example, they consider themselves Catholic while not accepting many crucial dogmas, or they combine Christianity with Buddhism, or they pray while not being certain they believe.¹¹¹

The proliferation of spirituality among formerly orthodox believers (and, indeed, among some former unbelievers) is evident in the reactions of denominational leaders to the demands of their parishioners. Like manufacturers of consumer products, religions increasingly compete to develop a brand that appeals to a target population.¹¹² Thus, many contemporary Christian denominations increasingly dilute their doctrines and theologies in favor of a less divisive “religious nonjudgmentalism” that de-emphasizes denominational differences, doctrinal

is by no means unusual for the family to join a different religious group once they have visited various institutions in the new town.

Id., see also *id.* at 165 (relating the experience of a couple who reported that they “‘shopped for a church like they would shop for a car, looking for something comfortable and practical’” (citation omitted)); Trueheart, *supra* note 103, at 42 (observing that baby boomers “are a needy and a motivated bunch—with lots of experience in shopping for spiritual comfort”).

110. French, *supra* note 109, at 165–66; accord Berger, *supra* note 103, at 448 (describing use of Levi-Strauss’s term *bricolage* to characterize this form of religiosity—that is, “people putting together a religion of their own like children tinkering with a lego-set, picking and choosing from available religious ‘material’”).

111. CHARLES TAYLOR, *VARIETIES OF RELIGION TODAY* 106–07 (2002). Taylor notes that in the United States, the consumerization of religion resonates with the general consumer culture that developed in the wake of the dramatic growth of economic well-being in the latter half of the twentieth century. *Id.* at 102–03; see also Marty, *supra* note 5, at 664 (noting the “postmodern approach in organized religion, where the chaos of the marketplace and the ‘picking and choosing’ of religions have prevailed”).

112. See Frederick Mark Gedicks & Roger Hendrix, *Religious Experience in the Age of Digital Reproduction*, 79 ST. JOHN’S L. REV. 127, 154–55 (2005) (noting the consumerization of religion and religious experience triggered and facilitated by digitization and postmodernism).

requirements, and traditional themes like duty, responsibility, and sin, in favor of more comforting, inclusive, and therapeutic themes like the inherent worth of each individual, and the unconditional love that God holds for each person despite his or her imperfections.¹¹³ According to Alan Wolfe, “[t]alk of hell, damnation, and even sin has been replaced [in American churches] by a nonjudgmental language of understanding and empathy.”¹¹⁴ Sin is transformed from an offense against a holy God, to a self-defeating behavior.¹¹⁵

Perhaps the most important effect of spirituality is the change it has wrought on the understanding of denominational religion by those Americans who continue to value it. The traditional denominational church “held and dispensed the ‘means of grace’ through which the individual might attain salvation and without which that salvation was in jeopardy.”¹¹⁶ One of the principal tasks of the traditional denomination was to police the conformity of parishioners to the behavioral and creedal requirements of membership, and to certify the good standing before God of those members who comply with these requirements.¹¹⁷ In the contemporary church, however, “the individual is the focus and the exerciser of power”;¹¹⁸ individuals judge their religion on the basis of whether it helps them to understand and discover themselves in the midst of the demands of their everyday life, rather than whether its teachings and doctrines conform to an external and ultimate divine reality.¹¹⁹

One should not assume from all this that spirituality is a trivial or superficial approach to God. To the contrary, spiritual believers may

113. See WOLFE, *supra* note 107, at 155–84. Spirituality has accelerated a movement towards nondenominationalism that was already well under way in the 1960s. See, e.g., T. Luckmann, *The Decline of Church-Oriented Religion*, in *SOCIOLOGY OF RELIGION* 141, 147 (Roland Robertson ed., 1969).

One of the most important developments in American church religion is the process of doctrinal leveling. It can be safely said that within Protestantism doctrinal differences are virtually irrelevant for the members of the major denominations. Even for the ministry traditional theological differences seem to have an ever-decreasing importance. More significant is the steady leveling of the differences between Catholicism, Protestantism, and Judaism. There can be little doubt that Catholicism, Protestantism and Judaism are jointly characterized by similar structural transformations—a bureaucratization along rational businesslike lines—and accommodation to the “secular” way of life.

Id.

114. WOLFE, *supra* note 107, at 3.

115. *Id.* at 166.

116. HARGROVE, *supra* note 103, at 128.

117. See *id.*

118. *Id.*

119. Agam, Taylor suggests that the self-oriented character of spirituality is the result of a long series of developments in western history. See TAYLOR, *supra* note 111, at 8–13.

take their beliefs very seriously.¹²⁰ What is different about spirituality is not the seriousness with which its adherents believe, but rather the focus of that belief. For spiritually inclined Americans, religion is about revelation of the immanent, rather than the transcendent. Whereas the focus of religion has historically been its revelation of the reality beyond the temporal self, spirituality is centered on uncovering the reality of that very self.¹²¹ Spirituality casts religion less as the demand that believers fit themselves into God's plan, than as the demand of believers for a comfortably fitting God and plan.¹²²

B. *Fundamentalism*

The term "fundamentalism" originated in the reaction of American evangelicals to the secularization and permissiveness of the 1920s.¹²³ A "fundamentalist" in those days signified one who was ready to fight these trends by returning to the "fundamentals" of evangelical Protestantism.¹²⁴ Fundamentalism was chiefly characterized by militant resistance to modernism,¹²⁵ deep commitment to biblical literalism and an exceptionalist conception of truth,¹²⁶ and nostalgia for an earlier era in which Protestant faith and morality were reinforced by govern-

120. For example, a good friend of mine, who I know is deeply religious, was dissatisfied with the congregation provided by his denomination when he moved to a new town. He and his wife sought out congregations from other denominations until they found one that resonated with the spiritual sensibilities of their family.

121. See WOLFE, *supra* note 107, at 182–84; see also Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 67 (2002) (emphasizing "a profound change in the sociological, psychological, and intellectual role of religion in American life").

[A]t the time of the Framing, religion, for many Americans, was a source of comprehensive understanding about Divine Providence and the order of the universe. The rise of science, technology, psychoanalysis, and other profoundly secularizing influences, however, has altered perceptions about the role of religion. For many Americans, religion is now affective, psychological, and interior. Instead of being about the way things originated, are presently and will continue to be, religion, for many, is about the way one feels and copes with the vicissitudes of contemporary life.

Id.

122. See, e.g., TAYLOR, *supra* note 111, at 101 ("For many people today, to set aside their own path in order to conform to some external authority just doesn't seem comprehensible as a form of spiritual life.").

123. GILLES KEPEL, *THE REVENGE OF GOD* 105 (Alan Braley trans., 1994); MARSDEN, *supra* note 29, at 50–56.

124. ARMSTRONG, *supra* note 30, at 171; BRUCE B. LAWRENCE, *DEFENDERS OF GOD: THE FUNDAMENTALIST REVOLT AGAINST THE MODERN AGE* 168–69 (1989); MARSDEN, *supra* note 29, at 57.

125. ARMSTRONG, *supra* note 30, at 174; KEPEL, *supra* note 123, at 105; MARSDEN, *supra* note 29, at 66–67.

126. KEPEL, *supra* note 123, at 106.

ment and law.¹²⁷ The Darwinian challenge to literal interpretation of the biblical creation account was a particular concern of American fundamentalists during the early twentieth century.¹²⁸

Contemporary American fundamentalists constitute between 10 and 20 million people, or about a fourth of all American evangelicals.¹²⁹ Contemporary American fundamentalism remains focused on concerns similar to those that gave it birth nearly a century ago. Assailed on all sides by the decadent values of American popular culture, today's fundamentalists still seek protection in the stability of Biblical commands. They remain hostile to Darwinism.¹³⁰ They link extramarital sex, abortion, gay rights, and feminism as common threats to the traditional family, the preservation of which is a particular concern of fundamentalists.¹³¹ They not only continue to admire past regimes marked by much closer interaction of government and Protestant religion,¹³² but also are increasingly engaged in political efforts to enlist government in their fight against modernism.¹³³

This is not to say that contemporary American fundamentalists are intimidated by threats to their values. To the contrary, fundamentalists possess a "supreme confidence on religious questions" that stems

127 See ARMSTRONG, *supra* note 30, at 172 (observing that the premillenarian vision of early twentieth century fundamentalists was "xenophobic, fearful of foreign influence seeping into the nation through Catholics, communists, and Higher Critics," and "ambivalent about democracy," fearing it would "lead to 'mob rule'"); see also Jeffries & Ryan, *supra* note 75, at 297-306 (relating how the de facto Protestant establishment of the late nineteenth and early twentieth century collapsed in the mid-twentieth century under the pressure of modernist influences and growing Catholic political power).

128. See LAWRENCE, *supra* note 124, at 170; MARSDEN, *supra* note 29, at 34, 59; see also ARMSTRONG, *supra* note 30, at 175-77 (describing William Jennings Bryan's opposition to evolution, including his disastrous testimony at the Scopes trial).

129. Linder, *supra* note 33, at 6.

130. LAWRENCE, *supra* note 124, at 181. Professor Lawrence has suggested that fundamentalists now oppose evolution more as a symbol of modernist decadence than as a literal falsehood. *Id.* at 186.

131. See ARMSTRONG, *supra* note 30, at 266, 311; KEPPEL, *supra* note 123, at 135; LAWRENCE, *supra* note 124, at 186; WOLFE, *supra* note 107, at 251.

132. See, e.g., ARMSTRONG, *supra* note 30, at 273 (describing contemporary American fundamentalist admiration for the theocratic governments established by Puritan colonists); see also Marty, *supra* note 5, at 660 (stating that "[i]t is often presumed, at least by the more nostalgic souls, that at certain moments—e.g., for the West, in medieval Christendom or, for America, in certain colonial situations of religious establishment, there was coherence because the legal sphere was coextensive with the religious.")

133. See ARMSTRONG, *supra* note 30, at 310-16; KEPPEL, *supra* note 123, at 116-17. See, e.g., Jeffries & Ryan, *supra* note 75, at 342 (describing the efforts of Reverend Jerry Falwell and others "to convince fellow believers to abandon what was now called 'the myth' that fundamentalists should avoid politics"); see also LAWRENCE, *supra* note 124, at 86 ("Fundamentalists see a point of tension between the demands of faith and the exercise of public authority. They would like to compel all Americans to adopt their interpretation of the Constitution," though they generally seek to work within the framework of democracy, rather than to subvert it.).

from their belief that the Bible is the literal word of God, open and accessible to anyone.¹³⁴ George Marsden describes fundamentalism as a kind of “scholastic Protestantism,” which assumes that the literal meaning of the Bible is accurate about matters of science and history as well as doctrine.¹³⁵ Since fundamentalists understand their knowledge of the truth to be both objective and universally accessible, they are not interested in dialogue about truth, and tend to view those with whom they disagree as intellectually dishonest, consciously resistant to the truth.¹³⁶ In the fundamentalist view, an “honest” examination of “the facts” necessarily leads one to the truth.¹³⁷

By now, of course, fundamentalism has come to signify an approach to religion much broader than the retrenchments of twentieth century American evangelicals. American fundamentalism is only one manifestation of a worldwide movement that seeks to overturn secular society and to refill the ensuing vacuum with a revitalized public religion.¹³⁸ In the latter part of the twentieth century, “re-Christianization” movements arose in Europe, and “re-Islamization” swept through both Europe and the Middle East, undermining sociological predictions of the inevitable secularization of politics and society, and reinvigorating Roman Catholic, evangelical Protestant, and Muslim interventions in public life.¹³⁹

Contemporary global fundamentalism exhibits most of the characteristics of 1920s American fundamentalism. Contemporary fundamentalists are scriptural literalists who subordinate their individual interests to the absolute authority of a larger spiritual community that

134. MARS DEN, *supra* note 29, at 117–18.

135. *Id.* at 160.

136. See WOLFE, *supra* note 107, at 68, 251.

137. See MARS DEN, *supra* note 29, at 117–19. In this sense, American fundamentalists are more early modern than premodern. *Id.* at 119; see also *supra* note 25 and accompanying text.

138. See, e.g., LAWRENCE, *supra* note 124, at 3.

Because modernity is global, so is fundamentalism. The name in English is linked to turn-of-the-century Protestant Christianity, yet fundamentalism, like other reactions to modernity, has been at once cross-creedal and multi-cultural. Fundamentalism is as intrinsic and inevitable to Israeli *haredim* and Sunni or Shi'i Muslims as it is to American Protestants.

Id.

139. See, e.g., ARMSTRONG, *supra* note 30, at ix (“One of the most startling developments of the late twentieth century has been the emergence within every major religious tradition of a militant piety popularly known as ‘fundamentalism.’”); KEPPEL, *supra* note 123, at 2 (observing that during the 1970s, a “new religious approach took shape, aimed no longer at adapting to secular values but at recovering a sacred foundation for the organization of society—by changing society if necessary”); see also Mailloux, *supra* note 10, at 1584 (noting the existence of “certain anti-modernist movements within traditional religions including Christianity, Judaism and Islam”).

is believed to embody the one true religion.¹⁴⁰ Dan Conkle, for example, describes contemporary fundamentalism as encompassing any religion that regards its texts, doctrines, and other sources of authority as absolute, plain, and unchangeable guarantors of truth.¹⁴¹ Contemporary fundamentalists also continue to resist secular Enlightenment ideals and modernism generally.¹⁴² Moreover, because they see conflicts between religion and modernism as struggles between good and evil, they tend to be intolerant of those who disagree with them.¹⁴³ Like their American forebears, contemporary fundamentalists are nostalgic for an earlier time in which religion and government at least shared common moralities and goals, if they were not actually united.¹⁴⁴ Unlike their American forebears, however, who tended to withdraw from public life as much as they engaged it, contemporary global fundamentalists are more inclined to be politically active, if not actually subversive; they challenge secularism in public life head-on, by urging their particular religious truth as the sole governing ethic.¹⁴⁵

140. See LAWRENCE, *supra* note 124, at 5–6 (positing that in addition to a commitment to scriptural literalism, fundamentalism is also “an appeal to one community as authoritative interpreters of the pure, the sole, the ‘inerrant’ sense of scripture”); *id.* at 108–09 (“For [fundamentalist] believers, their community identity is vouchsafed by the authenticity attributed to their original scripture. Their loyalty as individual believers is measured by their corporate assent to precepts set forth within the canon. The canon looms as the fixed measure and the standard of all revealed truth.”).

141. Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1, 14 (1994); see also KEPEL, *supra* note 123, at 34, 35 (observing that the Society for the Propagation of Islam urges copying the life of the Prophet Mohammad “in the smallest of actions,” and defines “‘straying’ as any aspect of modern life that was not exclusively inspired by reference to the Prophet”); see also Conkle, *supra*, at 14 (noting that a fundamentalist “source of truth is absolute in the sense that it cannot be questioned on the basis of external evidence or arguments[,] plain in the sense that it requires little if any interpretation[, and] unchangeable in the sense that it need not be adapted to contemporary circumstances”).

142. LAWRENCE, *supra* note 124, at 6–8, 91, 101.

143. See, e.g., KEPEL, *supra* note 123, at 107 (arguing that the United States is prone to revert to fundamentalism “in times of stress, in the tradition of the Great Awakenings,” and that fundamentalists tend to identify catastrophes as God’s punishment for apostasy, seizing “upon the multifarious crises that have afflicted American society down to our own day, always ready with both a diagnosis and a cure—the cure of redemption”); LAWRENCE, *supra* note 124, at 114 (noting that for contemporary fundamentalists, “[a]ll are God’s soldiers or His enemies”).

144. See JON KRAKAUER, *UNDER THE BANNER OF HEAVEN* 137 (2003) (“The impetus for most fundamentalist movements is a yearning to return to the mythical order and perfection of the original church.”); see also LAWRENCE, *supra* note 124, at 15 (arguing that the three critical characteristic aspects of contemporary global fundamentalism are “the invocation of scripture, the reference to the past, the reliance on charismatic intermediaries”).

In Islamic countries there is no such nostalgia, but only because the past is still present. The separation of government and religion has only recently emerged as a possibility for Muslim societies, and still enjoys only sporadic and qualified Muslim support.

145. See KEPEL, *supra* note 123, at 4, 5 (noting that contemporary fundamentalists “share the remarkable characteristic of challenging the way society is organized: either its secular founda-

Bruce Lawrence nicely encapsulates the characteristics of contemporary global fundamentalism when he defines it as “the affirmation of religious authority as holistic and absolute, admitting of neither criticism nor reduction,” combined with “the collective demand that specific creedal and ethical dictates derived from scripture be publicly recognized and legally enforced.”¹⁴⁶

Fundamentalism is everything that spirituality is not. The fundamentalist truth is hard, literal, and exclusive,¹⁴⁷ what God has plainly revealed in his scriptures or to his servants.¹⁴⁸ This literalism prevents fundamentalism from accommodating believers looking for flexibility in their commitments to particular religious practices, doctrines, or forms of worship. Fundamentalism’s God is also the polar opposite of the God of spirituality; the fundamentalist God is a jealous one, hav-

tion—as in France—or its secular deviations from a foundation which is in part based on religion, as in the United States or the Islamic countries,” and that contemporary fundamentalists basically demand “a link with religion as the foundation of the social system”); *id.* at 191 (describing how contemporary fundamentalists seek to change the “social order so as to bring it into line with the commands and the values of the Old Testament, the Koran or the Gospels”); see also ARMSTRONG, *supra* note 30, at 360–63 (describing the persistence of violent and subversive strains of American fundamentalism including Operation Rescue, Christian Reconstruction, Branch Davidians, and Christian Identity); Marty, *supra* note 5, at 663 (noting fundamentalist strains of Islam, Judaism, and Protestantism that have “set out to reclaim regimes entirely,” and identifying other American evangelical forces with the more modest goal of claiming a “significant element in politics through the use of coalition and caucus strategies”); Frederick Clarkson, *Christian Reconstruction: Theocratic Dominionism Gains Influence*, VIII THE PUBLIC EYE MAG. pt. 1 (Mar–June 1994), available at <http://www.publiceye.org/magazine/v08n1/chrisrec.html> (detailing the growth and influence of the Christian reconstruction movement, which generally “seeks to replace democracy with a theocratic elite that would govern by imposing their interpretation of ‘Biblical Law’”); Linder, *supra* note 33, at 25–26 (describing “Christian Americanism,” a Calvinist view that church and state should be “separate but interlocking,” held by “mostly fundamentalist Protestants and conservative Roman Catholics who believe that the United States was established as a Christian nation—and who long to restore it”); Dean Schabner, *S. Carolina Targeted for Christian State*, ABC NEWS, Aug. 12, 2004, at <http://abcnews.go.com/US/story?id=96695&page=1> (reporting on group of conservative Christians that plans to move to South Carolina in groups of 12,000 to establish a state government based on the Ten Commandments and “conservative Christian values”).

146. LAWRENCE, *supra* note 124, at 27; accord Mailloux, *supra* note 10, at 1584 (describing contemporary fundamentalist movements as characterized by “radical criticism of secular modernity, Manichean narratives of communal identity, selective interpretations of scriptural texts, rhetorical intolerance of ideological disagreement, charismatic leadership and zealous discipleship, and profoundly intense commitment to action for the cause”).

147. See VATTIMO, *supra* note 9, at 87–88 (stating that theologically conservative Christians “always complain that in the secularized or weak conception of Christianity, the harshness, severity, and rigour characteristic of divine justice are lost, and with them the very meaning of sin, the actuality of evil, and as a consequence even the necessity of redemption”).

148. See MARSDEN, *supra* note 29, at 118–19, 159–60; see also LAWRENCE, *supra* note 124, at 5–6 (noting that more than a commitment to literal interpretation of sacred texts, fundamentalism is “also an appeal to one community as authoritative interpreters of the pure, the sole, the ‘inerrant’ sense of scripture”); *id.* at 27 (defining fundamentalism as “the affirmation of religious authority as holistic and absolute, admitting of neither criticism nor reduction”).

ing placed the world under his judgment—"under God"—to suffer his wrath and punishment unless it repents and returns to the one, true path.¹⁴⁹ Fundamentalism presupposes a single, transcendent reality which does not change, and to which believers must consequently accommodate themselves, rather than vice versa.¹⁵⁰ In the fundamentalist world, the Bible or the Koran, the clergy or the imams, grant access to reality, and it is a reality that excludes all others.¹⁵¹

C. Contrasts

Spirituality and fundamentalism differ in where they locate the sacred. Spirituality is focused on self-discovery, the "reality within," whereas fundamentalism is focused on an already evident reality that is external to the self. As a consequence, for practitioners of spirituality there can be multiple realities, whereas for fundamentalists there is only one.

Spirituality and fundamentalism are also distinguishable on the basis of their relationship to politics and government. In general, spirituality seeks freedom from government, so as to leave its seekers free to fashion the conception of the sacred that is best suited to them. Contemporary fundamentalism, however, seeks more than freedom from government; rather, it seeks to enlist government in endorsing and enforcing the singular conception of reality around which it is organized. Nevertheless, not all contemporary fundamentalists seek government power; in fact, until the 1970s, the historic stance of American fundamentalism had been withdrawal from the corruptions of government and society, rather than political engagement.¹⁵² Similarly, though spirituality seems open and nondogmatic about ultimate

149. See KEPEL, *supra* note 123, at 107, 110–11; LAWRENCE, *supra* note 124, at 24.

150. See KRAKAUER, *supra* note 144, at 166 ("In the fundamentalist worldview, a sharp dividing line runs through all of creation, demarcating good from evil, and everybody falls on one side of that line or the other."); LAWRENCE, *supra* note 124, at 121 ("Every expression of fundamentalism has a double emphasis: the collective good above individual choice, and advocacy of one interpretation of the collective good against all others, especially all inside others. To the recurring question, Are there any absolutes in a changing world? [F]undamentalists respond with a triumphant 'Yes!'"); see also MARSDEN, *supra* note 29, at 178 (As Richard Hofstadter observes, "The fundamentalist mind is essentially Manichean; it looks upon the world as an area for conflict between absolute good and absolute evil, and accordingly it scorns compromises (who can compromise with Satan?)."').

151. See KEPEL, *supra* note 123, at 203.

152. See *id.* at 116–17; see also *id.* at 114 (comparing Reverend Jerry Falwell, who withdrew the Moral Majority from political activity in advance of the 1988 presidential election, with Reverend Pat Robertson, who sought the presidency in that election); MARSDEN, *supra* note 29, at 112 (relating how early twentieth century fundamentalists saw themselves as "outsiders from the power centers of society, its politics, and its cultural life," and "viewed themselves as separated from the worldly powers").

truths, that openness can degenerate into its own kind of fundamentalism. Conservative believers especially are well acquainted with the intolerance imposed on religion by contemporary regimes of “tolerance.”¹⁵³

Finally, fundamentalism and spirituality may describe attitudes about certain beliefs and practices within a denomination, which do not necessarily apply to all denominational beliefs and practices.¹⁵⁴ For example, a member of a denomination may have the ecumenical openness to other faiths that characterizes spirituality, yet still believe that the ultimate purpose of religion is not discovering oneself but accessing an objective reality, as fundamentalists believe. Similarly, one may hold the spiritual belief that truth reveals itself experientially rather than methodologically, yet also believe with fundamentalists that truth can be known with such certainty that further searching and reexamination is forever unnecessary. Accordingly, although there are obviously fundamentalist and spiritual religions that conform to the sketches I have rendered, it may be more accurate to think of these as competing tendencies that often coexist more or less easily even within a single faith or a single person.

Nevertheless, all qualifications aside, there is little doubt that we live today, here and now, in a moment of global religious assertion, not withdrawal, that is much more fundamentalist than spiritual. Whatever may be the diversity of beliefs within their denominational confines, religions throughout the world that are properly described as “fundamentalist” are seeking political engagement and governmental control. It is, therefore, entirely proper to label as “fundamentalism” those contemporary religions that seek the coercive power of government to encourage and to enforce respect for, if not outright conformance to, a singular and transcendent divine reality.

IV. RELIGION CLAUSE DOCTRINE

This brings us to the present—to the end of modernity, the end of all transcendent narratives and unifying explanations. Here we find

153. See, e.g., TAYLOR, *supra* note 111, at 89 (noting “the soft relativism that seems to accompany the ethic of authenticity: let each person do his or her own thing, and we shouldn’t criticize each other’s ‘values’; this is predicated on a firm ethical base, indeed, demanded by it. The sin that is not tolerated is intolerance.”); Louis Bolce & Gerald De Maio, *The Politics of Partisan Neutrality*, FIRST THINGS, May 2004, at 9, 9 (arguing that although “an aggressive Christian right” has become politically active during the last generation, “the nonreligious have also become aggressive actors on the political stage,” possessing and promoting “an overarching worldview of their own—one that can fairly be called secularism”).

154. I am indebted to Michael Perry and Steven Smith for both this insight and the examples of it that follow.

Establishment and Free Exercise Clause doctrine constructed by a dialectic of spirituality and fundamentalism.

A. *The Free Exercise Clause*

It has become increasingly evident that religious nondiscrimination is the only plausible understanding of what the Free Exercise Clause can require in a religiously plural postmodern society marked by growing interest in spirituality and declining interest in traditional denominational religion. Confining religious exemptions to those affiliated with traditional denominations is biased against new or unconventional religions,¹⁵⁵ as well as against secular commitments that are as morally serious as religion.¹⁵⁶ On the other hand, applying the exemption doctrine so as to excuse from obedience to law any person or group whose beliefs and practices are incidentally burdened by law would result in significant numbers of people avoiding compliance with virtually every law on the books.¹⁵⁷ It was precisely this

155. William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311, 317 (1991).

A court is more likely to find against a[n exemption] claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous. The religious claims most likely to be recognized, therefore, are those that closely parallel or directly relate to the culture's predominant religious traditions.

[T]he measure of the importance of a state interest underlying a government prohibition is a function of the mores of the society, and those mores, in turn, are often a function of that society's religious values.

Id. (citations omitted); see also *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981) ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause.").

156. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1255 (1994) (stating that the exemption doctrine "privileges religious commitments over other deep commitments"); Marshall, *supra* note 155, at 319 (noting that "[g]ranting exemptions only to religious claimants promotes its own form of inequality: a constitutional preference for religious over non-religious belief systems").

157. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) ("Can a man excuse his [religious] practices to the contrary [of the law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879))); see also *Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); Eisgruber & Sager, *supra* note 156, at 1256.

[I]diosyncracies [sic] in the welfare functions of some individuals will support extreme and intuitively discreditable demands on social resources on their behalf [yet] [r]eligious belief need not be founded in reason, guided by reason, or governed in any way by the reasonable. Accordingly, the demands that religions place on the faithful, and the demands that the faithful can in turn place on society in the name of unimpaired flourishing, are potentially extravagant.

realization that started the Court on the road to restricting and eventually altogether eliminating the exemption doctrine.

The unworkability of the exemption doctrine, and the inevitability of its replacement by religious nondiscrimination, was evident in the draft exemption cases of the mid-1960s, decided only a few years after the Court adopted the exemption doctrine. The first of these cases involved a university student who sought exemption from the draft, not on the basis of the teachings of a denominational religion or any conventionally religious beliefs of his own that war is morally wrong, but rather on the basis of a personal morality derived from his study of mostly secular philosophy.¹⁵⁸ Clearly troubled by the unfairness that would have been wrought by limiting draft exemptions to members of denominational religions that teach the immorality of war, the Court expanded the statutory definition of religious belief far beyond its conventional meaning (not to mention the meaning intended by Congress), to encompass a person's "ultimate concern," or that which a person takes "seriously without any reservation."¹⁵⁹

Of course, a broad exemption of the kind potentially created by the Court in the draft exemption cases threatened the efficient operation of a military draft by allowing too many potential draftees to exit the system.¹⁶⁰ Accordingly, the Court declined a later opportunity to broaden the exemption to include those who oppose only unjust wars rather than all wars.¹⁶¹ The Court, however, never directly confronted the obvious unfairness inherent in a statute that allows members of historic anti-war denominations to escape the draft, but not those who conscientiously adhere to secular anti-war moralities and politics.

A similar dynamic affected the Court's decisions in the *Amish Cases* of the 1970s and 1980s.¹⁶² Clearly sympathetic to the corrosive effect

Id.

158. *United States v. Seeger*, 380 U.S. 163, 166-67 (1965).

159. *Id.* at 187 (alteration in original) (quoting PAUL TILICH, *THE SHAKING OF THE FOUNDATIONS* 57 (1948)); accord *Welsh v. United States*, 398 U.S. 333, 339-40 (1970).

What is necessary under *Seeger* for a registrant's conscientious objection to all war to be "religious" within the meaning of §6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.

Id., see also *Marty*, *supra* note 5, at 666 (observing that the "tradition that saw religion dealing always with a Supreme Being" is "thinned out" in *Seeger* and *Welsh*).

160. See *Gillette v. United States*, 401 U.S. 437, 455 (1971) ("Apart from the Government's need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining who serves when not all serve." (citations omitted)).

161. See *id.* (holding that the exemption applies only to those who conscientiously object to all wars, and not to those who conscientiously object only to a particular war).

162. *United States v. Lee*, 455 U.S. 252 (1982); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

that mandatory school attendance laws had on the Amish religious community,¹⁶³ the Court nevertheless feared the host of other groups that might claim exemptions from such laws.¹⁶⁴ It accordingly wrote its exemption opinion so narrowly that it apparently applied only to the Amish.¹⁶⁵ And when a decade later, in *United States v. Lee*,¹⁶⁶ the Amish sought exemption, not from the burden of compulsory school attendance laws, but from paying social security self-employment taxes, the Court shuddered at the potential avalanche of exemption claims from others seeking to minimize their own taxes,¹⁶⁷ and denied exemptions to everyone.¹⁶⁸

From *Lee*, it was a short step to eliminating the exemption doctrine entirely, save for a few narrowly defined exceptions. After a period during which the Court held that the exemption doctrine was inapplicable in several specific situations,¹⁶⁹ the Court largely abandoned the test, holding in *Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law

163. See, e.g., *Yoder*, 406 U.S. at 218.

As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

Id. (citation omitted).

164. See, e.g., *id.* at 215-16 ("[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.").

165. See *id.* at 235-36. The Court was "not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." *Id.* at 235. The Court further observed that "a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society" had enabled the Amish to make a "convincing showing" that "few other religious groups or sects could make" of the "sincerity of their religious beliefs." *Id.* at 235-36. Moreover, the Court acknowledged the "hazards presented by the State's enforcement" of the disputed statute, and the adequacy of the informal vocational training associated with Amish life as a substitute for compulsory high school education. *Yoder*, 406 U.S. at 235; see also ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 222 (rev. 3d ed. 2000) (observing that the Court "was careful to limit its decision [in *Yoder*] to groups like the Amish, with their centuries-long history and general record of good behavior").

166. 455 U.S. 252 (1982)

167. See *id.* at 259-60 (observing that "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs").

168. See *id.* at 261.

169. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (declining to apply exemption doctrine to the free exercise burdens caused by federal decisions relating to the use of federally owned land); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (declining to apply the exemption doctrine to the free exercise burdens caused by federal prison regulations); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (declining to apply the exemption doctrine to the free exercise burden caused by uniform regulations of U.S. military).

of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'¹⁷⁰

B. *The Establishment Clause*

Establishment Clause doctrine has followed a trajectory comparable to free exercise doctrine. As I have related, the Court began its development of anti-establishment doctrine with a decided emphasis on the necessity of separating church and state from each other's influence. In a society that eschews invidious discrimination, however, that values equality of persons, organizations, and ideas, there is no easy justification for denying persons and organizations the considerable benefits of the social welfare state simply because they hold religious beliefs or observe religious practices.¹⁷¹ Just as it was difficult under the free exercise exemption doctrine to distinguish religious beliefs entitled to exemption from equally sincere and intense secular commitments that were denied exemption, it also grew difficult to justify denying religious persons and organizations the social welfare benefits and grants that routinely go to secular individuals and organizations committed to ideologies no less intensely held or potentially disruptive than religion.¹⁷²

This became apparent in the 1980s, when the Court began to struggle with the reality that its Establishment Clause doctrine was founded on simultaneously opposing premises: "Neutrality" or religious nondiscrimination, and "separation" or discrimination against religion. In response, the Court began to narrow and abandon its separationist holdings in favor of religious neutrality.

Religious antidiscrimination—that is, governmental neutrality among religions and between religious and secular commitments—is a doctrinal principle perfectly suited to accommodate the growing popular interest in spirituality in a pluralistic, postmodern America that

170. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). The exemption doctrine remains part of the substantive protection afforded to religious practice by the Free Exercise Clause only in cases that involve the coincidence of another constitutional right with the free exercise right—the so-called "hybrid right" exception, *id.* at 881–82, and when government has set up a system of individualized exemptions, *id.* at 884.

171. See *supra* notes 73–74 and accompanying text.

172. See GEDICKS, *supra* note 70, at 111 (arguing that if the "establishment clause does not require that religious individuals be uniquely deprived of public welfare benefits otherwise generally available to all," then similarly the "free exercise clause does not require that religious individuals be uniquely relieved of legal burdens otherwise generally imposed upon all").

can no longer decisively demonstrate which beliefs are true, and which are false.¹⁷³ As Robin Lovin has argued,

It is not so much that the law denies the truth of religious claims and says religious claims are, after all, *only* individual preferences. The law—or at least the kind of law that is made by modern states—simply does not know how to treat *any* idea or commitment as anything else.¹⁷⁴

Under a regime of religious neutrality, Wiccans who worship pagan gods, pacifists who oppose the war in Iraq, Santerians who sacrifice household pets, animal rights advocates who agitate for increased protection of animals, New Age adherents who seek self-enlightenment, political activists who seek social retrenchments or reforms—all receive the same doctrinal respect as the denominations of history. Whether in protection from discrimination or in the distribution of public benefits, contemporary Religion Clause doctrine barely permits distinction among varieties of religious belief and secular moral commitment.

Of course, this is only half of the story of Establishment Clause doctrine, for while the reach of neutrality is considerable, it is far from complete. There remain the separationist decisions: those that ban public school prayer and government sponsored religious displays, that prevent government from resolving religious disputes within a church or other religious organization, that prohibit government from delegating its power to churches or directly funding religious worship, that permit government to exclude religious education from a funding program even when including it would not violate the Establishment Clause.¹⁷⁵

Separationism has long been labeled discriminatory and anti-religious, a violation of the religious nondiscrimination principle.¹⁷⁶ These arguments usually suggest that by invalidating government use of re-

173. See Jeffries & Ryan, *supra* note 75, at 368 (“In a nation of many faiths and none, it is hard to square officially sponsored school prayer and Bible reading with any viable conception of neutrality.”).

174. See Robin W Lovin, *Church and State in an Age of Globalization*, 52 DEPAUL L. REV. 1, 3 (2002) (“[A]lthough religion may be uniquely convincing and motivating for individuals, it becomes, for legal purposes, simply another individual preference, which persons are free to pursue as they like within the framework law provides.” (citation omitted)).

175. See *supra* notes 77–80 and accompanying text.

176. See, e.g., Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 40 (1997) (arguing that the Court should “not discriminat[e] in favor of secular organizations over religious organizations through the funding of only the former”); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116 (1992) (lamenting that the Warren-Burger Court’s separationist stance “more closely resembled freedom *from* religion (except in its most private manifestations) than freedom of religion” (citation omitted)).

ligious symbols or beliefs, separationism privileges secularism.¹⁷⁷ Thus, invalidation of government display of the Christian nativity or of the Ten Commandments, or reversing government removal of evolution from (or its addition of creationism to) the public school curriculum, is characterized as government establishment of the moral or cultural superiority of Santa Claus or Charles Darwin to the Judeo-Christian tradition.

There is a deep contradiction in this argument that usually goes unremarked, if not entirely unnoticed, by those who make it. To the extent that these government sponsored religious symbols and beliefs are portrayed as theologically vacuous, they are a rather ineffective antidote to secularism. Yet, to the extent that their display or use suggests serious theological content, the government's very act of appropriating them to its own uses violates the principle of religious nondiscrimination.¹⁷⁸ As Gianni Vattimo has pointed out, if you want to complain about the lack of Christ in Christmas, you cannot simultaneously complain about the lack of Christmas symbols in public life.¹⁷⁹

177 See Marty, *supra* note 5, at 668 (observing that “[m]any organizations on the religious right” view Establishment Clause decisions—and particularly those banning public school prayer—as “evidences that a ‘secular humanist’ conspiracy operates in the law and especially in the Supreme Court”); see, e.g., John Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1 (1978). The fundamentalist Pro-Family Forum defines “secular humanism” as a world view that, among other things, denies the divinity of Jesus, Biblical inspiration, the existence of the soul, life after death, heaven and hell, and the biblical account of creation. See ARMSTRONG, *supra* note 30, at 270–71.

178. Justice Brennan hinted at this contradiction in *Lynch v. Donnelly*:

Unlike such secular figures as Santa Claus, reindeer and carolers, a nativity scene represents far more than a mere “traditional” symbol of Christmas. The essence of the crèche’s symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His son into the world to be a Messiah. Contrary to the Court’s suggestion, the crèche is far from a mere representation of a “particular historic religious event.” It is, instead, best understood as a mystical recreation of an event that lies at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely “traditional” and therefore no different from Santa’s house or reindeer is not only offensive to those for whom the crèche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of “history” nor an unavoidable element of our national “heritage.”

465 U.S. 668, 711–12 (1984) (Brennan, J., dissenting) (citations omitted); see also GEDICKS, *supra* note 70, at 79 (asserting that “[t]he accommodationist opinions in [*Lynch* and *Allegheny*] transform the crèche and the menorah from religious symbols of deep spiritual significance into cultural artifacts”).

179. See VATTIMO, *supra* note 2, at 101.

[C]hristians cannot claim the right to expose the crucifix in public schools and at the same time adopt it as a sign of a particular, highly dogmatic religion. Or, Christmas can continue to be celebrated in Western societies as a holiday for all, but then it makes no

This is not to maintain that nondiscrimination or neutrality do not reflect any privileges, for they clearly do. "Neutrality" is a misnomer—part of the vocabulary of objectivity left over from modernity. I have generally used religious "nondiscrimination" in its place, but this word, too, papers over a variety of value choices that determine what kinds of distinctions the law may properly make between persons and their beliefs, and what kinds it may not.

Our language is simply deficient, at least for now. Imagine if you will, the legal language of three or four hundred years ago, as Western society was beginning its shift from the Christian narrative of belief to the Enlightenment narrative of modernity. Lawyers and scholars of the early modern era did not speak in terms of "equality of persons," or "religious nondiscrimination," or "neutrality," or the "separation of church and state," and the idea that there existed a physical truth about the world that one could discover and demonstrate without recourse to principles of theology was entirely foreign. It took decades, if not centuries, for the West to develop the language that appropriately captured the new concepts implicit in scientific rationality as framed by Enlightenment thinking.

We have a language problem today that is not so different. We are left with Enlightenment ideals of epistemological objectivity and moral neutrality to describe the relationship of law and religion in an era in which the possibility of such objectivity and neutrality has been irretrievably lost.¹⁸⁰ To say that spirituality is no more neutral than fundamentalism proves nothing in such an age. The question is not, which of spirituality or fundamentalism is "really" neutral, but rather, which of these two conceptions of religion is better suited for our times?

V. FUNDAMENTALIST FLAWS

Let me suggest three problems with fundamentalism as the preferred model of contemporary religion—or, if you prefer, three comparative advantages of spirituality over fundamentalism as such a model. First, fundamentalism is currently impractical. As Wall Street well knows, you cannot fight the market, even if the market is, some-

sense to complain that it has become too lay, too mundane, that is, that it has been deprived of its original, authentic meaning.

Id.

180. Cf. LUDWIG WITTGENSTEIN, REMARKS ON FRAZER'S GOLDEN BOUGH 10e (Rush Rhees ed., A.C. Miles trans., 1979) ("A whole mythology is deposited in our language."); ARENDT, *supra* note 3, at 25 (noting the "perplexity of having to deal with new phenomena in terms of an old tradition of thought outside of whose conceptual framework no thinking seemed possible at all").

how, “really” wrong. Religion must speak to people where they live, with answers to the problems they see as the most challenging. If believers are searching for immanence rather than transcendence, it is because they perceive that immanence meets needs that transcendence does not. If believers are convinced that self-discovery rather than cosmic discovery should be the focus of their religious worship and practices, then traditional denominational religions ignore this at their peril.

Second, fundamentalism is epistemologically implausible. In the face of radical religious diversity, digital access to global fields of religious information, and the epistemological and moral indeterminacy brought on by postmodernism, the claim by any single religion that it provides the only access to authentic religious experience is increasingly greeted with incredulity.¹⁸¹ In a market of only a few products about which information is difficult and expensive to obtain, any one of the market participants might plausibly claim (and typically all of them do) that its product is the only one that works effectively. In a market of hundreds of products about which information is ubiquitous, that claim will not be accepted.

Finally, fundamentalism is politically unimaginable. It is not quite impossible to imagine a majoritarian fundamentalist regime that at least some religious minorities would find preferable to a majoritarian regime committed to a spiritual conception of religion. One can envision, for example, that some American Christians might prefer to live under a Buddhist or an Orthodox Jewish regime than the secularism and aggressive toleration that might accompany a spiritual regime. But it does appear quite impossible to imagine that most unbelievers and most religious minorities—which in the United States means not only Jews, but innumerable other non-Christians like Muslims, Buddhists, Hindus, Sikhs, and so on, as well as Christians outside the bounds of traditional orthodoxy, like Mormons or Jehovah’s Witnesses—would choose a majoritarian fundamentalist regime over a

181. Gedicks & Hendrix, *supra* note 112, at 149.

Americans have interactive access to a vast array of credible choices of religious experience, at the same time that the ability of any single religion decisively to demonstrate its epistemological superiority has disappeared. In the face of such diversity and indeterminacy, no single religion can plausibly claim that it alone can access authentic religious experience.

Id., see also Berger, *supra* note 103, at 449 (“*Modernity pluralizes the lifeworlds of individuals and consequently undermines all taken-for-granted certainties.*”); Marty, *supra* note 5, at 662 (“[R]eligious pluralism is itself ‘inherently disintegrative of all consensus and community.’ In the eyes and practices of the religious public, pluralism cannot be overcome because so many of them conceive their faith to be based on specific and differing divine revelations to them.” (citation omitted)).

majoritarian spiritual one. No imaginable fundamentalist regime is likely to command the preferences of most religious minorities and unbelievers over a majoritarian spiritual regime.

None of this should be taken as a prediction or suggestion that fundamentalism is on the verge of disappearing. As Roger Hendrix and I have argued elsewhere, fundamentalism is not likely to retain mass appeal in a postmodern age, but that does not mean that it will not persist as a kind of "niche product."¹⁸² Indeed, significant numbers of people are drawn to fundamentalist claims of moral certainty in the metaphysical confusion that is endemic to postmodernism. Moreover, certain classes, such as the desperately poor, find little point in searching for the spiritual meaning of their situation, and find fundamentalist claims about transcendent reality attractive precisely because they wish to transcend their situation.¹⁸³ Fundamentalism is likely to persist, but not as a mode of belief with mass appeal.

VI. CONCLUSION

Religious nondiscrimination is a doctrinal response to spirituality, the quintessentially postmodern expression of belief. There is less need to be vigilant about the influence on government of spirituality because it is a form of belief focused on maximizing individual religious choice. This is not the same as saying that there is no need for vigilance, for as I mentioned, spirituality and nondiscrimination can lead to their own forms of oppression. Nevertheless, the instinct of spirituality is for religious liberty in its classic form, as the residuum of governmental absence, and not liberty in its more contemporary form, as the creation of affirmative government action.

Separationism, on the other hand, is a doctrinal response to fundamentalism, the quintessentially premodern expression of belief. There is greater need to be vigilant about the influence on government of a form of belief whose focus is the alignment of government with a singular vision of the divine reality. Nondiscrimination responds to a more tentative and thus more politically benign form of belief, separationism to a confident, robust, and even persecutorial form of belief. Perhaps this is why, to answer Geoffrey Hartman, "so few in Western democracies consider fundamentalism a serious solution to existential and political dilemmas."¹⁸⁴ Religion Clause doctrine privileges spiri-

182. Gedicks & Hendrix, *supra* note 112, at 156-57.

183. I am grateful to Jack Balkan for this insight.

184. Hartman, *supra* note 49, at 1578.

tuality over fundamentalism by applying nondiscrimination principles to the former, and separationist doctrines to the latter.

Like the “spirit of liberty,” the “spirit of spirituality” is “*not too sure that it is right*.”¹⁸⁵ The spirit of fundamentalism, by contrast, is certain that it cannot be wrong. The church-state interactions governed by separationism rather than nondiscrimination respond to the risk that fundamentalism could capture governmental functions and thereby use government power to endorse and to enforce an exceptionalist religious vision of reality. Fundamentalism longs for the return of the premodern Christian metanarrative, in which the Scriptures, the church, and the clergy functioned as the final arbiters of knowledge and truth. Fundamentalism generates fear and controversy precisely because it attempts to enlist the authority of the state on the side of a universal account of the world and humanity’s place in it, at a time when all such narratives have dissolved into tentative and local truths. Fundamentalism is not a plausible form for religious belief in a postmodern era. If religion is to survive as the vital force it has always been and still may be, it must do so as spirituality.

185. GERALD GUNTHER, *LEARNED HAND* 549 (1994) (“What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is *the spirit which is not too sure that it is right*.” (alteration in original) (quoting Judge Hand’s famous speech delivered at an observance of “I Am an American Day” in New York City’s Central Park on May 21, 1944)).