Preliminaries to a concept of constitutional secularism

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Constitutional arrangements, today, are facing the challenge of new forms of strong religion that have the apparent goal of reconquering the public space. These movements’ strategies typically involve Trojan horses designed to smuggle religion into constitutional law by arguing that a democratically achieved religious takeover of legislation, for the purposes of imposing divine command, is not constitutionally suspicious per se. Constitutionalism looks vulnerable to certain claims of strong religion when presented in terms of the free exercise of religion and pluralism. As a first step toward a more robust theory of constitutional secularism, this paper reviews some inherent difficulties of the concept. Constitutionalism relies on the use of the human faculty of reason and on popular sovereignty. The first consideration translates into the duty of public reason giving in law and denies the acceptability of divine reasons; the second precludes any source of law but the secular. A robust notion of secularism, animated by these considerations, is capable of patrolling the borders of the public square.

… the French people recognizes the existence of God
—French national convention, 1794

Strong religion is back in the public square.1 Constitutional arrangements are now facing new forms of religiousness due to mass emigration and, also, because the religion of both migrants and locals is changing to stronger versions that aspire to control or reclaim the public space. Strong religion is a social fact. Religious movements organize themselves politically and, in so doing, they challenge secular arrangements directly. In this regard, their chances of success vary considerably, but they are certainly capable of undermining the legal arrangements that claim to be neutral and generally applicable to all people living in the national community. This is a fundamental challenge to secularist processes including constitutionalism.

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1 I use the term “strong religion” in the sense Almond, Scott Appleby, and Sivan use it. See Gabriel A. Almond, R. Scott Appleby & Emmanuel Sivan, Strong Religion: The Rise of Fundamentalism Around the World (Chicago Univ. Press 2003). To avoid misunderstandings: the expression “strong religion” is used to avoid a one-sided concentration on the problems created by certain forms of Islam in and for Western countries. Such concentration would run the risk of unintended and unconscious bias that might undermine the equality of religious beliefs.
Strong religion varies among creeds and, consequently, may entail varying attitudes toward the legal order. Thus:

(a) A religious community may withdraw from the world and ask to be left alone: religious precepts would and should apply only to members of the community of believers. For them, exceptions are to be granted in the sense of being left on their own (isolationism—this is the claim of the Amish, for example);

(b) or, it is believed that a divine command will apply to government action when it comes to matters affecting religious people;

(c) or, that a divine command extends to conduct, including governmental conduct, outside the religious community (inclusivism);

(d) or, finally, that the whole country—namely, all citizens—should identify with the precepts of the strong religion.

In this last case, we have no problem with the stable homogeneous state, but the way it is achieved and its foundations remain outside constitutionalism.

Fundamentalist religions either cut themselves off from the rest of society and live within “walls,” real or virtual, or, alternatively, they aspire to impose their version of salvation on the rest of the society by creating general rules. The latter strategy requires the democratic cooptation of the legislative process and of the whole state apparatus. There is a constitutional version of this strategy. Here, religious legislation promises to respect constitutional values. Although solutions dictated by religion do not claim exemption from constitutional scrutiny, their proponents argue that a democratically achieved religious takeover for the purposes of legislating divine dictates is not constitutionally suspicious per se.

Strong religion may take legal pluralism to the extreme, that is, to the point of denying pluralism, insisting on the primacy of one religion’s rules over and against all other normative systems. The believers and their organizations may disregard the secular dimensions of their conduct and profess a loyalty that is not to the state.

What is jurisprudentially relevant, here, is that strong religion seems to have developed strategies to overcome the resistance of secularist jurisprudence to religiously grounded claims:

(a) There is the contention that secularism as a constitutional principle is an oxymoron, and that separation of church and state does not imply secularism—that this separation is, at best, a specific technical solution to the problem of institutional cooperation among equals and does not implicate a broader principle. From this perspective, neutrality is bogus. Secularism is a militant and biased position that does not respect religion; hence it contravenes the principle of tolerance.

(b) Beyond the rejection of the legitimacy of secularism, ostensibly liberal arguments are Trojan horses used to bring religious concerns into
the citadel of the secular state. Religion seeks to smuggle itself into the public and political sphere using fundamental rights language.\(^2\)

\(c\) People with a strong-religion agenda attack the legitimacy of the requirement of public reason giving in law and legislation. Modern constitutionalism has accepted the presence of religion and religiously inspired politics in the public space only where they have been translated, or are at least translatable, into “public reasons”—that is, where the reasons for their presence were accessible to all citizens. (It is immaterial to public reason giving what motives may underlie a public policy or constitutional position.) Strong religion denies the necessity or legitimacy of such translation.

A jurisprudential theory of secularism has to be able to withstand these challenges; however, most democracies are without a strong normative theory or practice of constitutional secularism. Constitutionalism seems vulnerable to some of the claims of strong religion when they are presented in terms of a free exercise of faith and of pluralism, even though the secularization of society seems to have pushed religion out of the public sphere. This is because the normative implications of this “voiding” of religion have not been instilled systematically in constitutional law; constitutional secularism remains subject to contingencies.

This paper is based on the assumption that, for the purposes of a judicially relevant constitutional theory, one need not take positions regarding the spiritual values behind secularism. Secularism as a constitutional concept does not require agnostic background assumptions.\(^3\) The term “secularism” is used herein to reflect no specific position regarding the truth of religion nor any preliminary position regarding the proper place of religion in society. It is not a form of atheism or secular humanism. It merely assumes a social, political, and legal arrangement that does not follow considerations based on the transcendental or the sacred.

\(^2\) This increasingly popular attempt is exemplified in Michael Perry’s scholarship. In his view such constitutionalism simply does not require that public and, in particular, constitutional decisions be based on public reason, as long as fundamental rights in the constitution are respected. See, e.g., Michael J. Perry, Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy, 36 Wake Forest L. Rev. 217 (2001).

\(^3\) Secularism is a term coined by George Jacob Holyoake around 1846. (Laïcité was coined only in the 1870s). Although the original meaning of Holyoake’s terminology was not antireligious, those who claim to be victims of discrimination directed against religions by secularism interpret it in such a way. Many of the cultural traditions, fears, and prejudices of those who are afraid of the persecution of their religious institutions, or who try to extend their autonomy on the basis of such fears and dangers, tend to refer to specific, culturally shaped meanings of secularism, laïcité, or laicidad. In many Latin American countries, e.g., laicidad resonates as a battle cry of anticlericalism (which means more than dislike of the clergy: it was an oppressive practice of persecution). The present use of the term secularism is deliberately void at this stage of the analysis.
Given the cultural and ideological implications of the term “secularism”—especially for those Americans who identify it with secular humanism—it must be emphasized that secularism is, at the least, a half-blank slate and is not a specific (or, as some might see it, militant) position regarding religion. However, secularism assumes that—as far as law goes—humans are capable of testing their experience without reference to transcendental concepts and concerns.

As a first step toward a more robust theory of constitutional secularism, the paper reviews some inherent difficulties surrounding the concept and identifies some core values and common practices underlying it. First, it considers the inherent weaknesses of secularism that facilitate the advance of strong religion in constitutional law. Section 2 discusses some normative consequences of constitutionalism that necessitate and animate secularism.

1. The weakness of secularism

Secularism is a somewhat unfortunate term for use in constitutional theory. It is overloaded—it refers to different, albeit interrelated, concepts in different languages and according to different disciplines. Here, I consider the term to describe certain social developments and, also, certain normative assumptions regarding the permissibility of religion. First, it is important to recognize the sociological implications of the term. Secularism and secularization (the second term commonly used in sociology) refer to specific social realities, which cannot be disregarded in constitutional choices. The social realities captured by the term “secularization” will be important for the normative constitutional concept of secularism: it refers to those institutional arrangements and vital forces that animate the normative concept of secularism itself.

Reflected in both the concept and the reality of secularization are degrees of uncertainty and ambivalence (“Did it really happen?” “Is it going on, and, if so, in what sense?” and so forth) that must be reflected in constitutional theory. Otherwise, the legislator or the judge could insist on imposing her own esoteric and misinformed vision on society. This would be not only impermissible but also mistaken; at the end of the day, such an imposition will turn out to be irrelevant or even dysfunctional. But this is exactly the problem for law: the more uncertain the normative concept (in conformity with the social uncertainty that it expresses) the less relevant or powerful it will be when applied. This is true of the legal concept of secularism, whose weakness originates in its fuzziness.

It is often believed that European constitutional secularism is intimately related to its commitment to the Enlightenment.\(^4\) Intellectually, European constitutions are creatures of nineteenth-century state consolidation—or

\(^4\)The missionary zeal of the Enlightenment is certainly present in the current debate in the sense that by limiting the impact of religion the believers are thought to be liberated. Further, the mission civilisatrice of enlightened secularism is intended to protect the still vulnerable self of the modern citizen against the “backward” that exists both outside and inside the borders.
represent an ideal of such consolidation. The idea of the modern constitution reflects a consolidation of the state based on national rather than religious identity.\textsuperscript{5}

Secularism, both as a social fact and as a feature of constitutionalism, is vulnerable to the challenges of strong religion because of its uncertainty as a legal concept. Secularism is rooted in, and reflects, an ambiguous social reality.\textsuperscript{6} Secularization may be operating at a social or cultural level, but this is not the same as public institutions becoming secular and operating under secular guidance. Constitutional law may claim that public institutions fill the public square, but this contention remains problematic and one-sided. The secularization of the state is a historical project still in the making; it is being realized by degrees. At its center, we find religion and its organizations ceding some of their power over various aspects of life in favor of the state.\textsuperscript{7} Secularism in constitutional law means that social functions of “churches”\textsuperscript{8} are taken over by the state or are privatized. This is the result, at least partly, of the changed self-perception of mainstream churches.

Notwithstanding its historical affinities with the Enlightenment, secularism remains uncertain and vulnerable. Prior to the Danish cartoons controversy (arising in 2005 over the publication in the Danish newspaper \textit{Jyllands Posten} of cartoons depicting satirical images of the prophet Mohammed, labeled by some as blasphemy),\textsuperscript{9} generations of European constitutional lawyers assumed

\textsuperscript{5} This consideration applies to constitutions of the twentieth century, including the mass constitution making that began in Africa in the Sixties and in Eastern Europe after 1989.

\textsuperscript{6} The inconclusiveness of constitutional secularism can be demonstrated by reference to innumerable concessions to religions and religious institutions in many areas of life in most countries. Speech can be restricted for religious sensitivity; there are invocations of God in constitutional preambles; and religious oaths of allegiance are common. The notion of “ceremonial deism” has been transplanted to South Africa, for example. See In re Certification of the Constitution of the Western Cape, 1997 1997 (4) SA 795 (CC) para [28] We have school prayers and insignia, which might be unconstitutional, in otherwise religiously permissive jurisdictions. See Zylberberg v. Sudbury Board of Education, (1988) 65 O.R. (2d) 641 (C.A. Ont.). Canadian schools have to be secular but secularism allows religious considerations in school policies. Governments often support mandatory religious instruction—sometimes, however, for good secular reasons (to prevent fundamentalism). Plural legal systems reflecting religious considerations are sometimes permitted, and the employment policies of various confessions are considered matters of institutional autonomy (resulting from separation of church and state). Concordat-type contractual regimes grant special status to churches as civic organizations.

\textsuperscript{7} Cf., e.g., Ernst-Wolfgang Böckenförde, \textit{Die Entstehung des Staates als Vorgang der Säkularisation [The Emergence of the State as a Process of Secularization]}, in \textit{Säkularisation und Utopie: Ernst Forsthoef Zum 65 Geburtstag [Secularization and Utopia: For Ernst Forsthoef’s 65th Birthday] 75, 76 n.5 (Kohlhammer Verlag 1967).

\textsuperscript{8} “Church” is used herein in a broad sense, referring to the gamut of organizations that run or govern religious life and are constituted according to the tenets of a religion. It is a non-denominational reference.

secularism as fait accompli. But the reality was a de facto secularism, without constitutional entrenchment in most countries and with many exceptions even where it was constitutionalized. Its prevalence had to do with the nature of the religious beliefs that prevailed in Western democracies; even where there was widespread social demand for religion, this often amounted merely to believing without belonging or even belonging without believing. In the last fifty years, religion in Europe and, in a different sense, even in the United States, has served as a point of reference only for purposes of vague identity or identification.

It was true that religions contained a particularistic element, but this was not expected to contribute, politically or culturally, to heterogeneity in a way that would have endangered social cohesion and loyalty to the state. Established religions were not a serious problem either, as long as equality was not violated. A convenience-based coexistence was made possible on the assumption that organized religions gave up, or were forced to give up, the claim to govern public life. It was assumed that the intensity of faith would diminish, and that even those who considered religion as the fundamental organizing force of life would accept living in accordance with religion only in a shielded private space. The alternative model indicated that the liberal state would allow religious activities within broad and equal limits: religious bodies would relinquish political aspirations, though not necessarily public participation, through persuasion. The normative position of secularism was based on the relativity of religion.

The reality is that secularization of the law has been and will remain a half-hearted compromise. Many constitutional systems have avoided arriving at unequivocal answers to the question of church-state or religion-state relations, at least in a systematic way, and have declined to take a clear and consistent position on the matter. Temporary concessions to religion have been granted in nominally secularist constitutional systems without regard to slippery-slope concerns; indeed, these concessions have been treated as consistent with

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10 “[T]he majority of the British people—in common with many other Europeans—persist in believing (if only in an ordinary God), but see no need to participate with even minimal regularity in their religious institutions.” Grace Davie, Religion in Britain Since 1945: Believing without Belonging (Making Contemporary Britain) 2 (Blackwell 1994).

11 See, for example, the “twin tolerations” model of Alfred Stepan, Arguing Comparative Politics 213 (Oxford Univ. Press 2001).

12 “La laïcité est aussi fondée sur cette irrécevable donnée de fait [qu’] aucune religion ne peut prétendre à l’universalité puisqu’elle repose par essence sur d’innuméreables articles de foi, dont on ne saurait par suite exiger de quiconque, ni qu’il y croie, ni qu’il n’y croie pas.” [Secularism is (also) based on the indisputable premise that no religion can lay claim to universality because each is based on innumerable articles of faith, in which one cannot demand of anyone either that they believe, or that they not believe.] Raymond Boudon, Pourquoi les intellectuels n’aiment pas le libéralisme [Why Intellectuals Don’t Like Liberalism] 100 (Odile Jacob 2004).
constitutionalism and even secularism or even as necessary steps in providing freedom of religion.

Perhaps the most visible sign of the unfinished business of secularization in law is the existence of blasphemy laws in Western democracies. Such provisions exist in many democracies, and they are applied in exceptional and mostly trivial cases. Europe was willing to forget their existence. However, beginning with the Salman Rushdie affair, there has been increasing demand for the application of such provisions to restrict public criticism, although not to apply them is what constitutional and cultural conventions would suggest. Not to apply a clear rule is a serious inconvenience, as seen in both the Rushdie and Danish cartoon affairs, yet there is some reluctance to repeal such provisions.\(^\text{13}\) In other areas of law, de facto compromises pervade the constitutional system, as seen, for example, in matters of religious education; even party formation and politics along religious lines are tolerated. Such negligent benevolence results from historical contingencies. Secularism exists as an unprincipled convenience.

This situation is the result of a long historical process. Beginning at the end of the nineteenth century, European Christian confessions gradually gave up their attempts to force believers to operate in civil society and state settings according to religious prescriptions. This is the factual basis for political secularization—a fragile one, indeed. The concession that various European creeds granted to the state was a matter of tacit resignation and worldly apathy, which only very gradually achieved normative recognition, as when, for example, France was defined as a secular republic, after a long political struggle, in order to consolidate the victory of the republicans. When rising religious fundamentalism once again attempts to define the public sphere, the secular powers have little normative foundation to which to refer in order to defend the achievements of the Enlightenment. (The ambiguous case of French laïcité is discounted here.)

The vulnerability of secularism in law is exemplified by the position of the Canadian Supreme Court, which found secularism to be compatible with religion-based policy considerations, as long as these did not preclude pluralism:

\[\text{[N]evertheless, all members of the Court interpreted the concept of secularism not to preclude at all that a public institute, like a school board, passes resolutions “motivated in whole or in part by religious considerations,” while it requires that “no single conception of morality can be allowed to deny or exclude opposed points of view.” The obligation of secularism placed on the school board is “aimed at fostering tolerance and diversity of views, not at shutting religion out of the arena.” … [I]t does not limit in any way … the freedom of Board members to adhere to}\]

\(^\text{13}\) After a thirty-year campaign, the U.K. abolished such a law on May 8, 2008. Criminal Justice and Immigration Act, 2008, c. 4, § 79 (Eng.) (taking effect on July 8, 2008).
a religious doctrine that condemns homosexuality but it does prohibit the translation of such doctrine into policy decisions by the Board, to the extent that they reflect a denial of the validity of other points of view.\textsuperscript{14}

Where religious considerations at the national level do not endorse the claims of strong religion, the permissiveness of the Canadian Supreme Court will be sustainable—and this is quite telling about the conventional and unprincipled nature of secularism in many constitutional systems.

Likewise, European law is ambiguous and vulnerable in matters of secularism. This is highlighted in the jurisprudence of the European Court of Human Rights, which famously granted protection to religious sensitivity in the Otto-Preminger-Institut case.\textsuperscript{15} The court states that while “those who choose to exercise the freedom to manifest their religion...cannot reasonably expect to be exempt from all criticism,” the responsibility of the State may be engaged when the manner of opposition to those religious beliefs threatens the peaceful enjoyment of the right guaranteed under Article 9, or, in extreme cases, even “inhibit[s] those who hold such beliefs from exercising their freedom to hold and express them.”\textsuperscript{16}

What constitutes an inhibition, here, will remain contested. Who will determine what amounts to inhibition? Is it up to religious sensitivities to set the social standards of permissible criticism and disrespect? Is pluralism a sufficient justification for respecting group sensitivities? Such constitutional nonchalance was affordable on the assumption that growing secularization would contribute to rights protection, freedom, and democracy. A stronger version of the secularist constitutionalism theory would assume that there can be no constitutionalism without some level of secularism, nor can it exist outside a secularized (modern) society. In this narrative, secularization corresponds to the fundamental tenets of liberalism, namely, individualism, rationality, and universality. In order to achieve these requirements, the particularism resulting from religious (or ethnic) allegiances has to be expelled from the public space.

All models of secularist constitutionalism presume some division of the public and private spheres; even a minimalist secularism assumes that the constitutionally controlled state determines (with benevolence, more or less) the boundaries of the public. There is a high level of variance as to the openness of the public sphere to the religious, especially to organized religion, but what matters, fundamentally, is that “[r]eligion no longer structures our space, it is not handed down but chosen (in the marketplace).”\textsuperscript{17} As Émile Poulat, the


\textsuperscript{16} Id., at ¶ 47.

\textsuperscript{17} MARCEL GAUCHET, LA RELIGION DANS LA DEMOCRATIE [RELIGION IN A DEMOCRACY] 107 (Gallimard 1998).
great sociologist of secularism and Catholicism in France, has written: “the public square is open to all, including churches, but is organized and functions without them, according to rules that do not depend on them.”

The public-private divide only superficially reflects the social dichotomy of systemic interactions and the life-world (to use the terms promoted by Jürgen Habermas). The more certain functions are provided in nonprivate (“societalized”) and secularized systemic relations, the more religion becomes a matter for the life-world, and it might lose its importance even there. Or, as the success of new religious movements indicates, spiritual and other needs emerging in the life-world are satisfied outside the organized forms of traditional religions and their institutions, which, at least in the past, used to have totalizing aspirations and, hence, a claim to determine systemic interactions or even to offer such interactions.

To cite an example that goes back to Max Weber, religion offered a system of interaction for banking, creating its rather limiting rules and also its mechanisms of trust building. Secularization offered the possibility of establishing creditworthiness outside one’s religious community. Today, systemic interactions relying on “rational” (that is, nonpersonal) objective considerations supply the need in secular communities for creditworthiness. However, for relatively marginalized groups—for example, immigrant communities in Europe—systemic relations are not a solution, as they may not satisfy the “objective” criteria of creditworthiness applied by banks. Here, the assurances of the life-world will replace the systemic interaction, where religion (or ethnicity and extended family, as in the case of Chinese immigrants) again plays a functional role (consider the international money transfers by Indian Muslims in conformity with *Hawala*: the trust that is needed for the transcontinental financial transfer is, again, based on the piousness of banker and debtor.

18 ÉMILE POUJOT, L’ÈRE POSTCHRETIENNE [THE POST-CHRISTIAN ERA] 16 (Flammarion 1994).

19 Here I follow the definition in *ENCYCLOPEDIA OF RELIGION AND SOCIAL SCIENCE* (Karel Dobbelnaere & William H. Swatos, Jr. eds., Altamira Press 1998). Clearly, the dichotomy “private-public” is not a structural aspect of society but a legitimizing conceptualization of the world, an ideological pair used in conflicts by participants. Sociologists, of course, might study the use of this dichotomy in social discourse and conflicts, but it is not a sociological conceptualization. It should be replaced by Habermas’s conceptual dichotomy—system versus life-world, used here in a purely descriptive sense. It is in the systemic interactions that societalization occurs: relationships became basically secondary, segmented, utilitarian, and formal. By contrast, in the life-world—the family, groups of friends, social networks, the neighborhood—interaction is communal. Primary relations are the binding forces of such groups: relationships are total, trustful, considerate, sympathetic, and personal. See Bryan R. Wilson, Aspects of Secularization in the West, 3 JAPANESE J. RELIG. STUD. 259–276 (1976); BRYAN R. WILSON, RELIGION IN SOCIOLOGICAL PERSPECTIVE (Oxford Univ. Press 1982). The trend toward societalization is very clear in the distribution and the banking sectors—such as the replacement of neighborhood stores by large department stores, where the interactions between shopper and seller are limited to a money exchange for goods. Beyond the life-world, interactions became societalized.
The foundations for the legal assumptions regarding the public-private divide are problematic. The boundaries of the public are constantly shifting and renegotiated. Church-state relations are evolving in history and reflect unprincipled divisions and interferences. What is private is not simply a matter of governmental definition and fiat; meanwhile, various religions may challenge definitions of the status quo as new understandings and forms of faith emerge. The assumption that the boundaries of the public square can be shaped ultimately by secular forces disregards, to some extent, the strength of religious and spiritual needs. These needs and, hence, religion itself remain as independent variables in the process of public-private boundary shaping. As Pierre Chaunu reminds us, the history of religion follows its own rhythm and, although it is related to intellectual history and the history of emotions, it is autonomous.\(^2\)

The public-private divide is both normative and part of a social dialogue. To a considerable extent, constitutional law is what solidifies (and, increasingly, undermines or rearranges) that divide. It is a fundamental tenet of constitutionalism that constitutional law and the political process shall determine the boundaries in regard to where religions and their institutions, as autonomous spheres, shall begin. However, in reality, these are not two neatly separate social domains. Moreover, these already fuzzy boundaries are subject to sudden internal changes and, consequently, to changes in the relations between the two imagined worlds. But constitutionalism clings to its professed ability to determine the divide, although, in the best of cases, all it does is to reflect the boundary changes and crystallize them in normative form.

The “secularist” assumption that religion is relegated to the private sphere—and will be protected there—became problematic within constitutional law not only because of the pressures from increasingly aggressive religious interests but also, in part, due to the increasing constitutionalization of the legal and, consequently, of the social system. Contemporary constitutional law in most countries seeks to penetrate spheres hitherto respected as private and, hence, off-limits to public law. The best-known techniques of such penetration are seen in such doctrines as horizontal effect, *Drittwirkung*, state action, and so forth. Much of what was once understood as private and, therefore, subject to a liberty interest, in the sense of being exempt from state intrusion,\(^2\) is now having to satisfy constitutional considerations. Religious freedom and the autonomy of organized forms of religion, which had been thought necessary for the free exercise of religion, have been breached by this penetration. Obviously, the conflict becomes extreme where such intrusions—for example,

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\(^2\) Not all the constitutionally guaranteed spheres of the private were left in this condition of state nonintervention. Private property was always subjected to public interest, and it is now increasingly colonized by regulatory law.
the imposition of gender equality in private relations—come into conflict with strong religion and its different values. Religions were accustomed to finding refuge for their practices in the bastion of private life. As the new, aggressive constitutionalization enters the private sphere, new threats emerge for ways of life shaped by strong religion.

A secularism that results from convenience, carelessness, and tacit compromise remains fragile and not only because it seems to have no identifiable program or weak justiciable standards. The fragility results from the very nature of the self-understanding of the contemporary liberal state.

The logic of contemporary liberalism compels the state, even in constitutionally secular countries such as France or Turkey, to adopt a positive, benevolent attitude toward religions, mostly for good reasons. Such attitudes flow not only from the political necessity of respecting powerful groups but from the obligations of tolerance. Further, in many jurisdictions, because of the state’s positive obligation to promote or facilitate the exercise of fundamental human rights, the free exercise of religion is deemed to require governmental facilitation—so long as this facilitation is not discriminatory and respects state neutrality. Such positive obligations would compel a government to extend this benevolence to strong religion generally, in light of the prohibition against religious discrimination. In addition, the modernity that animates liberalism has moved from an active form to a more reactive one, rendering it less self-confident and, hence, less aggressive, more passive, even beyond mere tolerance, in the face of alternative forms of life-world, including premodern forms that are otherwise suspect. The reluctance to take vigorous, prohibitive positions is all but inevitable, where a belief in indeterminacy prevails, and this makes it difficult to insist on specific solutions that politically informed wisdom may suggest.

The uncertainty surrounding the values underlying secularism originates in the historical formation of the concept. Consider the differences between secular India and France. India experienced religiously motivated genocide at the founding moment of partition. This resulted in the ban on the use of religion in politics in the 1951 Representation of the People Act. That foundational genocide and the later violence that forcefully reminded Indians of continued genocidal threats led the Supreme Court of India to find that secularism is an unamendable principle of the Indian Constitution. The Indian experience could not be more different from the experience of France, where, in the making of laïcité, the republicans fought a cold civil war with the monarchs and their Catholic Church allies, in a range of public areas (from marriage to education); still, laïcité was not inspired by massacres like a Saint Bartholomew’s Eve. In both instances, constitutional secularism emerged as a set of legal practices pointing in a certain direction, namely, toward denying a

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public role to religion and its organized activities. Both experiences reflect an exclusion of religion from the affairs of the state, and there seems to be enough commonality for a shared principle.

In a few instances, the practices that expel religion from the public sphere—summed up as laïcité/secularism—became constitutional values and were written into the constitution. Sometimes only fundamental organizational arrangements were constitutionalized.\(^{23}\) In many instances, only specific practices of secularism were written into the constitution, without using the expression in a general sense.\(^{24}\) It makes some jurisprudential difference whether the principle behind a constitutional practice is articulated as a concept in the constitution or not. But even if secularism emerges from a set of relevant social and legal practices to find its way into the text, its meaning remains obscure. The history of the “building blocks” is controversial and cannot in itself help to bolster the principle of secularism. For example, it took twenty-five years of legislation in France, culminating in the 1905 law on separation of church and state, to consolidate a commitment to laïcité, which was constitutionalized as a concept only in 1946.\(^{25}\) But the laws of these twenty-five years reflected very different perspectives. Some of them were anticlerical, and even antireligious, while others were concerned only with the influence of the Catholic Church on politics and public life.\(^{26}\) “The conflict had nothing to do with ‘believers and ‘nonbelievers’ but with the opposition between two visions of France.”\(^{27}\)

\(^{23}\) The nonestablishment clause of the U.S. Constitution or the separation clause in the Hungarian Constitution (“The State and the church operate separately”) might serve as examples.

\(^{24}\) For example, in Mexico, only a statute declares that Mexico is a secular state that cannot favor or disfavor religion. The original 1917 Constitution refers to laicidad in the context of education as applicable to all schools, but the reference is now replaced by a reference to separation. Original: “Art. 3º. La enseñanza es libre; pero será laica la que se dé en los establecimientos oficiales de educación, lo mismo que la enseñanza primaria, elemental y superior que se imparta en los establecimientos particulares.” The current version, as amended in 1993, states that “Freedom of religious beliefs being guaranteed by Article 24, the standard which shall guide such education shall be maintained entirely apart from any religious doctrine and, based on the results of scientific progress, shall strive against ignorance and its effects, servitudes, fanaticism, and prejudices.” This anti-prejudice secular position in principle entails that religious positions be officially reviewed, criticized, and censored in the education context. Defenders of church rights and free exercise might find this antireligious or at least antireligious, but, for reasons to be discussed, such a position fits into a constitutional notion of secularism as long as it does not violate free exercise and neutrality.

\(^{25}\) “Le fond de la question est que si les Constitutions ne définissent pas la laïcité, c’est parce que, aussi bien en 1946 qu’en 1958, celle-ci est un principe déjà bien clarifié dans le droit.” [The heart of the matter is this: if constitutions did not define secularism, it is because, equally in 1948 as in 1956, it was a principle already well defined in law.] GUY COQ, LA LAÏCITÉ, PRINCIPE UNIVERSEL [SECULARITY, A UNIVERSAL PRINCIPLE], QUESTIONS D’ÉPOQUE [Series: QUESTIONS OF THE TIMES] 85–87 (Le Félin 2005).

\(^{26}\) Here I follow ÉMILE POULAT, NOTRE LAÏCITÉ PUBLIQUE OUR PUBLIC SECULARISM (Berg International 2003). For a summary of Poulat’s position in English, see http://religion.info/french/entretiens/article_93.shtml.

Secularism in the sense of separation of church and state, or of state-controlled and faith-controlled activities, remains fragmented even in the most secularist constitutional systems. In France, *laïcité* does not apply in Alsace-Moselle, and, all around the country, church buildings are subsidized, and municipalities determine the admittance of religious personnel to local hospitals to provide health care. Ironically, it was the same Aristide Briand, one of the masterminds of the 1905 secular political victory, who entered into the secret Concordat with the Vatican in 1925. Turning to secularism in India, one finds that personal religious law is applicable, at least to Muslims. Meanwhile, in Turkey, there is mandatory religious instruction in public schools; moreover, such instruction is based exclusively on Sunni Islam.

In light of the above, it is no surprise that secularism, as applied in the different legal systems, remains a fuzzy constitutional concept and, as such, its constitutional status remains uncertain. In most liberal democracies, it is not expressly recognized in the constitutional text or jurisprudence. Seemingly similar references to secularism in different jurisdictions, in fact, may reflect conflicting practices, just as different constitutional terminologies may describe compatible practices. Even where “secularism” is mentioned as an accepted concept having constitutional value, it is often subject to the unprincipled wishy-washiness of balancing—or disregarded in the name of proportionality—for the sake of free exercise of religion. Constitutional secularism, even if officially endorsed, may not correspond to social realities: it may exist without corresponding social practices. Indeed, many scholars consider secularism to be no more than a convenient façade: “The terminology of state secularism, neutrality and non-sectarianism seem[s] to be little more than vague code words useful for the theoretical construction of a framework within which sensible compromises that are required in a religiously plural society, can be reached.”

Beyond the legal uncertainties of secularism, there are realities that must be faced. What if constitutionally advocated secularism does not reflect social practices—or, for that matter, has not reflected them for some time? What happens if the constitution and constitutional theory operate under the wrong assumptions regarding social practices? After all, secularization and the resulting secularism of social life are disputed concepts in both sociology and theology. Jose Casanova argued quite some time ago against the “secularization thesis” (that, in those societies rooted in the Christian tradition, religion has become a marginal or, at most, a private matter). Church attendance may continue to diminish among the followers of Christian traditions in most Western societies; nonetheless, religion and its institutions strive continuously to bring religion

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back into politics. The United States and Poland offer good examples of religions regaining their position in the public space in intensely religious modern societies, although religion’s role in the public sphere of the European Union remains divisive. However, in many other countries of the world that were, at least for a while, candidates for constitutionalism, strong religion seems to be the fundamental ideological and perhaps social obstacle to constitutionalism. In Western democracies, strong religion—principally, Islamist and Christian fundamentalism—challenge the prevailing arrangements that are considered to be dictated by secularism or by what used to constitute secularism.

I happen to agree with those who claim on normative grounds that in order to sustain modernity, or sustain public order as ordered liberty, one needs a considerable level of secularization (in one sense or another). Constitutionalism exists only where the society does not take into public consideration transcendental concerns: people are buried in cemeteries not because it facilitates resurrection but for public health reasons.

It is not clear what happens if new forms of spirituality emerge or take over spirituality. Is this going to be the end of secularism and, thus, of constitutionalism? Or is it possible that such spirituality will promote the same values that animate constitutionalism? Many forms of religiosity in contemporary constitutional states tend to be personal and exist, to a considerable extent, outside traditionally recognized institutional confessions. Even where there are well established religious organizations, their doctrines may not be decisive for the believers. But where religious experience is personal, religious dictates remain important social factors in the modern world, perhaps on the rise, and need to be addressed in the constitutional construction of secularism.

At least one more fundamental complication must be taken into account in the constitutionalist equation. Émile Poulat has repeatedly reminded us that, instead of a bipolar, that is, church-state relation, today we have a triangle, as individuals position themselves vis-à-vis these two players in accordance with

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30 In Joseph Weiler’s view, the current European identity deficit is in itself a sufficient reason for an affirmation of religion in the European constitution. See Joseph Weiler, Un’Europa Christiana (Biblioteca Universale Rizzoli 2003).

31 Consider the departure of laymen from Catholic doctrines in such matters as abortion. Only 23 percent of U.S. Catholics agree with their bishops that abortion should be illegal under all circumstances and 70 percent of Mexican urban Catholics think abortion should be permitted in some or all circumstances. See Poll on Catholic Opinion in Urban Areas of Mexico, a survey prepared by Applied Statistics for Catolicas por el Derecho de Decidir A.C. with the assistance of the Population Council of Mexico (June 2003), cited in Catholic Attitudes on Sexual Behavior & Reproductive Health, available at http://www.catholicsforchoice.org/topics/international/documents/2004worldview.pdf. Consider also the widespread use of contraceptives. Further, in many countries the percentage of those believers who find church involvement in politics excessive or too powerful is increasing. In the United States, a 2006 Pew survey found that only 32 percent of Americans believe that the Bible should have more influence on U.S. laws than the will of the American people (against 63 percent). Meanwhile, sixty percent of white Evangelicals wanted to increase the Bible’s influence. See http://pewforum.org/docs/?DocID = 153.
their conscience. The state is there to respect the free conscience of its citizens, whose conscience was earlier left to the good offices of their respective faiths, which might or might not have directed these consciences on behalf of the state. Some citizens expect the “state” to liberate them from the “church”; others pose the “church” against the “state.” This is a matter of personal choice. In other times, the religious organizations provided the necessary homogeneity for the social order. However, once religions have entered into intense competition with each other, such homogeneity became much less likely. Public order had to be established irrespective of organized religion. It is the constitutional duty of the state to provide order by government, and this may come into conflict with social conduct based on personal or religious choices.

The self-understanding of strong religion forces us to rethink the assumptions about the social order that once served as the basis for constitutionalism. Why do we need such reconsideration—and reinforcement? It is enough to look at the increased, worldwide demand to reinterpret international human rights law and domestic constitutional arrangements—to the detriment of freedom of expression and personal liberty, in particular—in favor of respect for religious sensitivities. In practice, this means not only additional restrictions on freedom of expression but also a change in the public role of religion. This entails not only religion-dictated exceptionalism that goes beyond known forms of accommodation, extending even to faith-dictated arrangements of public life, imposed on nonbelievers and other denominations. By this logic, religions as institutions of collective confessional existence should also be promoted by exceptions, even beyond what follows from their autonomy in organizing religious life. The exceptions would include their full participation in public life and politics on their terms. The cumulative effect runs the risk of balkanization and of institutionalizing religious intolerance while undermining other constitutional rights and secular reason.  

How is constitutional secularism responding to all these difficulties of ordered liberty? Constitutionalism is a theory of state. According to this theory, the state is responsible for social order and cooperative coexistence among social groups. Secularism is a form of ordered political coexistence that does not admit of according preference to, or allowing domination by, religious, social, or political groups. This requires that citizens be somewhat loyal to the state or, at least, not stand actively against it. But what if a religion denies the authority of the state to regulate matters that the religion’s authorities claim are under their jurisdiction? What if there is more than one religion making such claims in a society? Believers who follow the agenda of a strong religion

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12 In Michel Rosenfeld’s view, this is not inevitable. In his dialectics, a brutally crusading religion is simply not readmitted to the pluralist universe, and radically intolerant religions are readmitted “on condition that they pose no serious threat to other religions or to nonreligious conceptions of the good.” MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 209 (Univ. of California Press 1998). But judicial decision making needs intelligible standards to decide the problems of the moment.
often challenge the assumptions of the constitutionally enhanced national community and represent a major challenge to the tolerance-based modus vivendi.  

If there were clearly legitimate strategies for action resulting from the secularist commitment, then social, political, and cultural forces that feel threatened by strong religion would, in turn, have a clear agenda and coordinated action plan. Defenders of the constitution would be able to craft legal strategies. I do not see such an arsenal available and working. Legal answers remain divisive, even when they pretend to be obvious, as was the case with the French foulard legislation that was passed with near unanimity and relatively little public protest. From the perspective of principle, secularism, for all its pragmatism, is not immune to challenges; the danger is that there remains very little to rely on when it comes to demands for additional concessions to religious demands that are in line with the slippery slope of existing conciliatory practices. Of course, this does not rule out the possibility of generating, or reinforcing, a toolkit of secularist responses and a growing social and legal commitment to secularism.

2. Secularism as a dictate of constitutionalism

It is in the foregoing context that the current challenge to secularism must be placed. The revival of religion, especially in its strong forms, and the contemporary psychological need for religious association in many Western societies challenge the individualistic understanding of citizenship. Many people construe their identity on the basis of the public standing of their religious identity. The challenge to constitutional secularism comes from the emotionally charged revival of religious identity and also from religion becoming, once again, a major organizing force of collective action, at least in many parts of the world where constitutionalism had been based hitherto on the primacy of the secular. Given the interrelations existing in a globally organized world, such developments have consequences even in countries where local religion, in itself, is unable to influence collective action.  

Because of the uncertainties of secularism we have an intellectual problem in constitutional law that is not limited to one or another national jurisdiction.

13 Arguments of cultural pluralism are sometimes used to disregard the legal universality promoted by government. The sovereign state claims to be based on a comprehensive national community, while pluralism insists on the impossibility of such comprehensiveness. These are typically nonreligious arguments, though they are used increasingly by strong religion. I address this important challenge in a separate article.


15 Religion-based group considerations are recognized in EU law only as an exception, as in the case of Northern Ireland (religious preference to the underrepresented in police recruitment).
Part of this uncertainty results from the fact that it has no clear standing among constitutional values, even if certain elements of secularism (such as the separation of church and state or the autonomy of religious organizations) are stated in law as certainties. It is not clear which established constitutional category secularism fits into or what is the underlying value behind secularism. It is not an individual right that would be easy to justify, and it is not necessarily a separation-of-institutions issue. It is true that a narrow understanding of secularism would mean nonestablishment, that is, noninterference of organized religion in the exercise of public power. But for what reason?

What are the foundational concepts of constitutionalism that are relevant in addressing strong religion judicially? My claim is that certain fundamental demands of constitutionalism propose and demand secularism. These demands animate the principles of secularism that can be translated into the practices that constitute secularism. From observation of the way modern societies and their cultures operate vis-à-vis religion, certain assumptions may be drawn regarding the preconditions and demands of constitutionally governed societies. In order to allow such empirical realities to operate fully they also need to be articulated within a broad normative concept that reflects and modifies that reality and protects it from other realities.

Apart from the empirical differences arising from contingent practices and terminological differences, there seems to be enough commonality among these to allow us to construe the shared principles that form secularism. Consider the French position: notwithstanding important later variations, as a matter of principle, the 1905 law on separation was about denials. It denied public funding to religious practices because such practices were no longer permitted to be public functions or services. A public service must be administered by the state—this removes the religious service from the public sphere. This removal renders religion a private concern—although not in the sense of a personal matter.

Of course, there are important variations in what is deemed to be public. According to the German experience, a public function (education) may be carried out with state funding by religious entities. And yet, the activity will remain public, integrated into public administration and sponsored as part of a publicly administered service. In the core area of the public sphere, namely, the political, this principle (as principle) is uncontested.

The political dimension is the one that is particularly important for secularism and secular constitutionalism. In this regard, the principle behind India’s highly specific approach to secularism does not differ from that underlying the French approach or, for that matter, the German, even though German constitutional law does not recognize secularism as an independent principle.

As part of the effort to keep religion out of the public sphere, and out of the realm of politics in particular, some legal systems apply strict bans regarding the organization of the political process and election-related institutions—and specifically political parties—along religious lines. As then—prime minister Jean-Pierre Raffarin said in the debate regarding the ban of the Muslim headscarf in French state schools: “Religion cannot be a political project.” This goes
beyond the demand that the state shall not take sides in matters of religion. Here the religious forces that would like to use the state for faith-related purposes are prohibited from taking part, at least directly, in politics.

Once again, however, the principle of keeping religion out of politics results in an unfinished process, especially where the political overlaps the symbolic and representational aspects of life. This is partly due to the nature of law, which cannot easily respond to symbols. What would be the legal remedy for alleged violations of secularism when a prime minister or president of a country attends a religious procession? Is this a violation of the demand of separation? What if he is there in a private capacity? What makes his presence private? Is not such attendance merely a fitting sign of respect for the head of state to express toward the beliefs of a large group of citizens? Who would have standing in such cases? Sometimes this is a minor issue, but not where the president will be reelected as a good Christian or the prime minister is running as someone loyal to Shinto religious traditions. Further, the presence of the head of state at such occasions sends a strong message about the proper relations between church and state.  

If the shielding of the political from the religious remains an unfinished project, it will be even more problematic to purge the legislative proscription of human conduct of religious considerations. This is the soft underbelly of secularism. The central demand of strong religion asserts the permissibility of behaving in conformity with divine command, even to the point of vindicating the notion that conduct shall be based on the divine command. In these more aggressive formulations, all conduct must be based on divine command, and this is not confined to believers only. Meanwhile, only a specific formulation of secularism expressly confronts this latter claim, arguing that secularism means freedom from religion.  

To complicate the matter, in certain democratic constitutional communities religious parties were considered essential to the building of democracy. After World War II, the German political establishment included Christian parties, which were close to the ideology of the major denominations. Germany’s Grundgesetz has incorporated the provisions of the previous, pre-Nazi Weimar constitution regarding the privileged status of established churches. The German state continued to rely on the welfare services provided by Christian churches, which continued to have privileged treatment by the state. This was a deliberate choice of Chancellor Adenauer and of the political elite; it was assumed that governmentally reinvigorated churches would be able to bring the German people closer to post-Nazi humanitarian and democratic values, more so than other, less credible social institutions. Of course, this strategy works only where the churches are ready to endorse democracy and are not antagonistic to otherwise secular projects of the state. It was only under these circumstances that the situation of “practical concordance” could have been achieved. This did not cause major problems for the constitutional state because the rapid secularization of German society did not allow the emergence of strong religion. But it was achieved to the detriment of politically more “suspect” minority religions.

For example, some decisions of the Supreme Court of Israel consider freedom from religion to be an individual right of the nonobservant: “Tolerance in religious-secular relations, for example means recognizing the existence of two important human rights—freedom of religion and freedom from religion—that require accommodation and compromise.” Aharon Barak, The Judge in a Democracy 64 (Princeton Univ. Press 2006).
Consider the “no driving on the Sabbath” debate in Israel. For some of those who find the dictates of their strong religion constitutionally relevant, the sacred shall prevail over constitutional law, even in regard to the non-observant. Sometimes, it is professed that divine law is beneficial to human rights or offers a superior human rights regime. But, at its heart, this position finds constitutionalism for its own sake irrelevant or a matter of second order, applicable only where the sacred is silent. Likewise, constitutionalism has very little to do with such positions, which are considered constitutionally irrelevant. Nevertheless, as part of the project that smuggles religion into the constitutional scheme, it is averred that positions rooted in strong religion fit well with constitutionalism. In the context of the example above, those who make this claim will argue that the ban on driving does not violate any deeply held convictions of the driver while allowing driving on the Sabbath violates the deepest convictions of religious bystanders; hence, the ban is legitimate.

One way to support such a position is to argue that the free exercise of religion should take precedence over a mere liberty interest. Here, the religious concerns are presented as free-exercise issues. This position, of course, relies on a very broad concept of free exercise, whereby the existence of violations of religious prescriptions by third parties constitutes an obstacle to one’s own free exercise of religion. Proponents of such positions may further argue that religious concerns and feelings should be protected because they are balanced against interests that have lower constitutional status.

A second line of constitutional justification relies on the following argument: religion-based preferences may be constitutionally justified on apparently nonreligious grounds, rendering unnecessary any arguments about expanding the requirements of the free exercise of religion. According to this logic, even if the law of the state were to adhere to religious commands, as long as such commands satisfied the democratically endorsed fundamental concerns of the majority, or local majority, this democratic support would provide sufficient grounds for such legislation, regardless of the motives alleged. Alternatively, by the same logic, the restrictions may be viewed as serving public order. The secular and the religious claims may be of equal value or the hierarchy of their values may be irrelevant: it is the democratic choice that legitimizes the imposition of restrictions on the driver, who is, in any case, subject to all sorts of restrictions relating to his driving. It is claimed that the law will be considered valid—that is, constitutional—on nonsectarian grounds, because, for example, the inconvenience of the drivers is less than the suffering.

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18 It is a separate consideration to what extent some dialogue with strong religion is required/ permissible in a pluralistic version of constitutionalism, and whether or not the result might be some incorporation of strong religion into constitutional arrangements and if this is possible. I discuss these issues in a separate article, Constitutionalism Facing Strong Religion (Nov. 5, 2007) (manuscript on file with I•CON).
of the majority believers: “the journey is not an attack on [the drivers’] integrity.”

With these far-fetched constructions, one can comfortably deny that it is respect for the sacred that motivates the legislation. Without a strong secularist position, such arguments may find their way into certain readings of constitutionalism. However, the relation between a restriction on the conduct of a third party to satisfy religious dictates and the outrage of the religious person is asymmetrical. The act of the nonbeliever may be disturbing for the believer as a violation of the divine order, but this distress is a lesser evil than an intrusion into the conduct of the nonbeliever. At least from a secular perspective, demonstrably negative impacts on conduct are, prima facie, more significant than alleged emotional impacts, even if it is argued that the latter are inevitable in the light of religious precepts. It is fair to assume that the religious person will likely be troubled; in a normative sense, according to religious tenets, the believer has a duty to be troubled, when confronted with the knowledge that others are driving and violating the Sabbath. But this is a concern about others and about the divine order, while the mandated observance means restrictions on a person’s own actions. Of course, if the conduct imperiled the manifestation of religious beliefs, the equation would change. But strong religion likes to claim that any departure from divine command imperils free exercise, because it forces the believer to live in an improper world.

As the Sabbath driving controversy indicates, there are a number of fundamental societal and constitutional issues at stake when the dictates of religion are turned into law, regardless of the prima facie reason given. These concerns implicate the crucial components of secularism, namely: (1) the epistemological preconditions of constitutionalism (in the sense of “what kind of assumptions do constitutional subjects have to have?”); and (2) the possibility of popular sovereignty and of sovereign state power.

(1) Secularism, as an institutional arrangement, provides protection to a reason-based polity against a social (dis)order that is based on dictates of religious doctrine and emotions. When constitutional law insists on secularism, it insists on the possibility of a reason-based political society.

Secularism is a doctrine of state (in the sense of being about the nature of the state) such that personal considerations are elevated to the level of public (political)

19 Gidon Sapir & Daniel Stratman, Why Freedom of Religion Does Not Include Freedom from Religion? 24 LAW & PHIL. 467, 494 (2005). But it is exactly in order to avoid the tyranny of the religious majority, by basing a choice on religious grounds among competing interests, that the liberty interest is elevated to a right—the right of being free from religion—as a form of freedom of conscience and religion.

40 Secularism makes strong assumptions about the sources of, and relevant arguments in, the legal system; see below. A modern legal system is predisposed negatively toward emotions, which continue to be seen as disruptive passions to be tamed.
assumptions. The secular constitutional state is presupposed to exist as a political community of citizens exercising their rational faculties. The political system operates with that assumption. This results in the nonadmissibility of revelation and faith-based knowledge, as not all citizens are endowed with the proper apparatus to understand such faith-based claims. Acceptance of religious arguments privileges the believers; rational arguments, however, are equally accessible to all.

It is not just a convenience of modernization to rely on the—unfortunately too-often-false—promise of reason and human rationality. Basing the legal system (its laws and decisions) on secular arguments differs fundamentally from a system based on religious arguments, and not only because the secularist can tentatively demonstrate the practical advantages of reason, insofar as one prefers modernity generally. To allow nonsecular arguments and grounds for legislation runs close to official support of religion, “including reinforcement of religious conduct that undermines foundational liberal principles of critical inquiry, religious and ideological pluralism, and secular reason.”

Secular (public) reason-giving in law is also crucial for the human rights component of liberal constitutionalism in the following sense:

The secular character of the normative system embodied in human rights doctrine is essential to its comprehension. All its premises, values, concepts and purposes relate to the homocentric world and to ways of thought freed from transcendentalist premises and from the jurisdiction of religious authority.

Of course, we all have had some negative experiences with what is called reason; indeed, it has become extremely fashionable to distrust it. But the

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42 Religious leaders and ideologues who campaign against their “victimization” by the neutral secular legal system claim that the public-reason requirement amounts to the exclusion of their arguments and concerns from public life; hence, they claim, they are treated as second-class citizens. But this claim is an impermissible confusion of permissible arguments. The secular public-reason requirement applies to legislation only. Again, this is not meant to deny the historical relation between religious ethical claims and those moral claims that serve as foundations of liberal constitutionalism. But the intelligibility of secular reasons is not symmetrical to that of religious reasons: only secular reasons are intelligible to all. See, e.g., Cass Sunstein, Beyond the Republican Revival 97 YALE L.J. 1539 (1988).

43 YEHOSHUA ARIEL, THE THEORY OF HUMAN RIGHTS, ITS ORIGIN AND ITS IMPACT ON MODERN SOCIETY [In Hebrew], quoted after Frances Raday, Culture, Religion, and Gender 1 INT’L J. CONST. L. (I•CON) 663, 663 (2003). In fact, “from a liberal point of view, religion may be perceived as a way of directing human beings from the liberal ideas of self-direction, critical thinking and personal responsibility.” Sapir & Stratman, supra note 39, at 472. The suspicious elements of religion, once it seeks to organize public life, do not preclude a robust protection of the exercise of religion. In fact, religion, like free speech, needs overprotection in the form of accommodation (a distinct protection, compared to most other needs of conscience), and receives it quite often. However, the state should be extra cautious, once such an overprotected need makes claims in the public sphere.
alternative to reason is emotional politics and an arbitrary system, where the emotional dictates of religion will rule human choices. The desire to protect religious emotions stands against all that modern law is about. If emotional distress becomes a decisive consideration in law, then what would matter, finally, is how angry one group can be made. Law will then be subject to the dictates of sensitivity, and highly intense religions will have a natural advantage until all social actors become passionately emotional.

The second consideration pointing toward a reason-based (secular) constitutional system is epistemological. Secularism—and not only because of its intimate relation with the Enlightenment—mandates a constitutional arrangement where autonomous critical reasons are to be respected as foundational for communal coexistence and self-regulation. The constitutional state is based on the assumption that individuals have autonomous morality. All state positions should be subjected to the critical examination by the reason of autonomous beings. This is obviously impossible where God’s commands are to be followed.

Secularism expresses the need for legal choices to be based on secular public reasons, that is, on reasons accessible to all, quite apart from their religious beliefs. Religiously grounded reasons have to be “translated” into secular ones. For most translation theories, the requirement of a public reason is satisfied as long as the legislative reasons are presented and accepted on grounds reasonably accessible to all—that is, on grounds that do not presuppose some act of faith or belief in scripture, and without the constitutional arrangement itself being an act of faith. The legislative reasons given must be honest; their honesty and accessibility are subject to judicial review.

The requirement of public reason giving has broader social implications. Citizens must learn to think critically—otherwise democracy is meaningless. In practical terms of constitutional law, this has imperative consequences for—among other concerns—education. A departure from secularism in favor of allowing denominational education runs the risk of depriving citizens of the fundamental faculty of public reasoning, at least in the case of certain denominations. The historical link to the Enlightenment and to human rights as empirical constituent elements of constitutionalism is obvious here. It is not by

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45 These theoretical requirements were accepted in law quite some time ago. The Lemon test requires that a statute, to be constitutional, “[f]irst [m]ust have a secular purpose; second its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement of government with religion.” Lemon v. Kurtzmann, 403 U.S. 602, 612-613 (1971). For Canada, see Chamberlain v. Surrey School District No. 36, 2002 CSC 86; [2002] 4 R.C.S. 710.
accident that it was Condorcet who argued that in order to keep humans free and equal before the law (that is, to realize the potential of article 1 of the French Declaration of the Rights of Man and of the Citizen, namely, that people are born free) “public instruction is the duty of society in regard to its citizens. ... as a means to make equality effective,” which means an equal access to the facilities that guarantee access to Enlightenment. \(^\text{46}\)

Denominational education is more a political concession by secularism than a principled act of tolerance and respect for autonomous choice. Adults, being autonomous in their private judgments, would have the right to opt out of public education. Children, lacking such autonomy, are denied the capacity to choose. But perhaps the issue does not end there. When government, reluctant to interfere in parental choices, grants parents the opportunity to opt out, it may be foreclosing children’s subsequent capacity for autonomous choice as adults. It is exactly this betrayal of the children that Justice William O. Douglas complains about in his outraged dissent in \textit{Yoder}. \(^\text{47}\)

The fight for the control of education is not only pragmatic in the sense that it has considerable impact on shaping the forms of thought and customs. In many regards, the claim of the state to be the protector of autonomous critical reason challenges the current role of many traditional religions, which increasingly define themselves as the ultimate providers of a consistent idea of the world that has the capacity to justify individual and collective human action. \(^\text{48}\)

(2) Democratic constitutionalism recognizes only one source of power, and this is the power of the people over itself. The first and foremost consideration is that constitutional systems presuppose and are created to enforce popular sovereignty. This is of fundamental importance to secularism. Popular sovereignty means that all power in the state originates from people, therefore \textit{it cannot originate from the sacred}. This is best captured in a decree of the French National Convention from 1794, which states that “the French people recognizes the existence of God.” \(^\text{49}\) God thus exists by popular recognition. In consequence, no other entity has original powers,

\(^{46}\) “... [D]’obtenir les mêmes facilités pour acquérir les lumières,” Condorcet [Jean Antoine Nicolas de Caritat, Marquis de Condorcet], \textit{1 CINQ MEMOIRES SUR L’INSTRUCTION PUBLIQUE} 35, 75 (Charles Coutel & Catherine Kintzler eds., Edilig 1989).


\(^{48}\) \textit{GAUCHET}, supra note 17, at 105–106.

\(^{49}\) “\textit{Le peuple français reconnaît l’existence de L’Être Suprême ...}” \textit{DECREE OF THE CONVENTION MONTAGNARDE OF MAY 7, 1794}. Contrary to the American Declaration of Independence, the French already in the 1789 Declaration had disregarded the authorship of God in matters of inalienable rights: the rights are set forth by the Assembly “in the presence and under the auspices of the Supreme Being.”
including the powers to legislate. All entities exist by wish of the sovereign, including religious institutions, regardless of the ontological precedence of certain entities in the state including religions. The people’s power is sovereign and cannot be a delegated power; it cannot exist by God’s grace. A contemporary constitutional theory that would deny people’s sovereignty in the name of divine supremacy is unsustainable. Constitutional patriotism, or constitutionally endorsed nationalism, might capture constitutional identity but not religion. As Baubérot has pointed out, laicization of the state means the refusal to have religion stand as the symbol of national identity.

A particular historical interconnection exists between popular sovereignty and secularism. Secularism emerged as a denial of the divine power of the king as sovereign, in favor of popular sovereignty, at least in the French revolutionary version of this relationship. Beginning in 1789, the French revolutionaries, afraid of all particularism, prohibited intermediaries between the individual and the sovereign nation. Suspicion of “cults,” which took the form of private associations, continued to animate the anticlerical forces, even up to the turn of the twentieth century.

Apart from the failure to impose constitutionally attractive internal structures on hierarchical religious organizations, which would go against the principle of institutional religious autonomy in any case, theoretical considerations still point to a specific concern of secularism. The collective control over the individual, which is often implicated in religious autonomy, is potentially dangerous to popular sovereignty. Popular sovereignty emanates from individuals; it exists as the aggregate of individual choices, and such autonomous individual choices serve as the foundation of democratic society.

Constitutional secularism results from popular sovereignty, but it is more than that. It reflects a deep interest in, and respect for, the free exercise of religion. Such secularism is necessary for the maximization of freedom of religion,

50 The Le Chapelier Act of 1791, named after its principal proponent, the delegate Isaac René Guy Le Chapelier, prohibited all intermediary organizations between the state and the individual. Particular organizations, collectives following communal agendas, were most often hotbeds of counterrevolutionary movements and the Catholic Church, with its traditional organization, with its collective loyalty to the king, the pope, and God, was particularly suspect.

51 The original idea of the 1905 law on the separation of church and state was to bring down the church hierarchy by granting all power of collective use of church buildings to democratic associations of believers. In practice, the lack of interest in democratization by the believers and the various governmental compromises and the jurisprudence of the Conseil d’État quickly submitted these bodies to clerical supervision. The idea of radical church democratization had to be given up, as far as the state was concerned. However, in the modernization process, the churches had to find an answer to the challenge of their democracy deficit.

52 Today some of the religions, especially in their strong, sometimes charismatic, versions consider democratic considerations simply irrelevant, which re-creates the conflict in different terms.
together with other fundamental freedoms, and, in particular, the absolute freedom of conscience to all and to all consciences. It is in this sense that a secular (laïque) republic means just the opposite of a confessional one, which, as a rule, cannot take such a stance.

The sovereignty of a people exercising its faculty of reasoning is the essence of the constitutionalism that necessitates secularism.

From a strictly legal-constitutional perspective, what matters is the answer to the question: What has normative authority in law? In that regard, constitutionalism and Western constitutions have made a secularist choice. Liberal constitutional law and the legal system based on it are about the understanding of law’s authority as a human creation formulated in a secular process and enabling such processes to continue. Constitutions in nonsecular societies may make a different choice. This is legitimate from the perspective of state sovereignty, but it cannot be considered constitutionalism.

Constitutional doctrine is the art and science of permissible arguments. Jurisprudence and legal doctrine are about deciding, authoritatively, what amounts to legally permissible, relevant argument. To paraphrase Richard Rorty, 53 in constitutional law, at least in this regard, secularism acts as conversation stopper. It prevents religious arguments from taking over the role of the conversation stopper. What does not fit into the concept of secularism, remains (and shall remain) suspect in constitutional discourse.