

RELIGIOUS TRUTH, PLURALISM, AND SECULARIZATION: THE SHAKING FOUNDATIONS OF AMERICAN RELIGIOUS LIBERTY*

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On Christ the solid Rock I stand,
All other ground is sinking sand;
All other ground is sinking sand.¹

Twenty years ago, the Supreme Court dealt a blow to religious liberty. In *Employment Division v. Smith*,² the Court effectively overturned a quarter century of constitutional doctrine, reducing the protection of the Free Exercise Clause, in large measure, to an equality right as opposed to a liberty right. Under the Court's prior doctrine, the Free Exercise Clause required serious constitutional scrutiny of laws that imposed substantial burdens on religiously motivated conduct, scrutiny that sometimes resulted in constitutionally required, religion-based exemptions for the religious believers whose freedom the laws impaired.³ According to *Smith*, by contrast, the Free Exercise Clause generally offers no protection for religiously motivated conduct, no matter how great the burden on religious liberty. It protects religious equality by prohibiting laws that target religious conduct for discriminatory treatment, but such laws are rare.⁴

In the broader scheme of things, however, religious liberty remains relatively vibrant and robust in the United States. Notwithstanding *Smith*, the Free Exercise Clause is not meaningless, because some laws do discriminate against religion.⁵ And when the government discriminates

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¹Edward Mote, *My Hope Is Built* (originally published in EDWARD MOTE, *HYMNS OF PRAISE* (1836)), available at <http://www.cyberhymnal.org/html/m/y/myhopeis.htm>.

²494 U.S. 872 (1990).

³See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁴For a competing view of *Smith*, contending that it was not a dramatic or surprising doctrinal innovation, see MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 216-25 (2005).

⁵See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

against religious speech, the Free Speech Clause offers corresponding constitutional protection.⁶ In addition, Congress has resurrected pre-*Smith* legal standards through religious liberty statutes—the Religious Freedom Restoration Act of 1993 (RFRA)⁷ and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)⁸—that protect religious practices even from neutral, nondiscriminatory laws. Although the Supreme Court invalidated RFRA in its state and local applications,⁹ the Court has applied the law vigorously in the federal-law context.¹⁰ And it has rejected an Establishment Clause attack on RLUIPA, which reaches state and local lawmaking in select settings, ruling that Congress is free to extend religious liberty beyond the confines of *Smith*.¹¹ States, too, have considerable discretion to protect religious liberty more broadly than *Smith* demands, and many have done so, either through their own religious liberty statutes or as a matter of state constitutional law.¹²

The scope of religious liberty is a matter of ongoing debate. In the short term, this debate is likely to include questions concerning the proper meaning of RFRA and RLUIPA, as well as the question of whether *Smith*'s interpretation of the Free Exercise Clause itself should be revisited or refined. Needless to say, these questions deserve careful attention. No matter how these and other specific issues are resolved, however, America's basic commitment to religious liberty remains intact, at least for now. But can this commitment survive over time? Will we continue to support religious liberty as an important constitutional value and a fundamental human right? This question may be less urgent than the more immediate issues that confront us, but it is no less significant. And if I am correct, dramatic changes in the American religious landscape—developments that have accelerated in the two decades following *Smith*—suggest that the long-term future of American religious liberty may be in jeopardy.¹³

In Part I of this Essay, I begin by recounting John Locke's arguments for religious toleration, which included a religious-moral argument grounded in Christianity and a political-pragmatic argument based on religious pluralism. Part II explains how Locke's arguments, and variations upon them, have supported the development and spread of religious liberty. In Part III, I suggest that a good part of the explanation lies in a growing recognition that religious liberty finds support in the teachings of not only Christianity but a variety of other religions. The Essay

⁶See, e.g., *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

⁷42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

⁸42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

⁹See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁰See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

¹¹See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

¹²See EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 975-76 (3d ed. 2008).

¹³I formulated the basic thesis of this Essay while teaching from Professor Leslie C. Griffin's excellent casebook, including especially chapters 9 and 10, which directed me to some of the sources that I cite here. See LESLIE C. GRIFFIN, *LAW AND RELIGION: CASES AND MATERIALS* 619-703 (2007).

then turns in Part IV to developments and trends in the American religious landscape, including the diversification, modernization, and individualization of religion as well as the increasing impact of secularization, both within religion and outside of it. In Part V, I suggest that these developments and trends, over time, may seriously threaten our society's acceptance of the underlying justifications for religious liberty and therefore our societal commitment to religious liberty as a fundamental value. I end the Essay with a brief, and rather pessimistic, Conclusion.

I. "THE LOCKEAN REVOLUTION": JOHN LOCKE'S RELIGIOUS-MORAL AND POLITICAL-PRAGMATIC ARGUMENTS FOR RELIGIOUS TOLERATION

The basic issue of religious toleration—and, more broadly, religious liberty—arises from the existence of competing claims of religious truth. Should nation-states tolerate or grant religious freedom to those who reject the dominant religious view, that is, to those who embrace some other religion or no religion at all? In Western history, states initially reasoned that they should not. But then came John Locke and the emergence and growth of religious toleration and religious liberty.

Prior to what Professor W. Cole Durham, Jr., has called "the Lockean revolution,"¹⁴ governments in the Western world tended toward regimes of coerced religion. European states (and American colonies) embraced different views concerning the proper meaning of Christianity. Many maintained formal religious establishments, complete with coerced religious conformity, taxes supporting the established religion, and compelled religious observance. The underlying justification for such an approach was two-fold, resting in part on religious-moral reasoning and in part on political and pragmatic concerns.¹⁵

From a religious-moral perspective, it was widely understood that there is but one true religion, and the leaders of each nation-state, of course, believed that their own version of Christianity was that one. Individuals who embraced a competing religious perspective were deluded, as were those who rejected religion altogether. The state properly demanded that these dissenters cease their heresy and follow the true commands of God. By insisting upon religious conformity, the states themselves were honoring God by using the power of the state to force all citizens—and therefore the polity as a whole—to honor God's will. In addition, they were furthering, paternalistically, the individual religious well-being of their citizens, including dissenters, by leading them down the one true path to religious salvation. The dissenters undoubtedly disagreed, but they were deluded in their false beliefs. Coercing religious truth was in the interest of all.¹⁶

¹⁴W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1, 7 (Johan D. van der Vyver & John Witte, Jr., eds., 1996).

¹⁵*See id.*

¹⁶As Professor Griffin has explained, this view conformed to the teaching of Saint Augustine, who argued that "it is good for individuals to be brought to the truth by any means, including the use of force." Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*,

This religious-moral justification was joined by a more pragmatic, political justification for maintaining an established religion to which all citizens were required to adhere. In particular, it was believed that enforcing a common religion promoted the state's interest in political stability and social peace, and that it did so in two related ways. First, the religion served as a type of social glue, unifying society by giving citizens a uniform sense of meaning and purpose. Second, the state's promotion of this religion encouraged a reciprocal, religion-based motivation for supporting and obeying the governing regime. As a result, the religious establishment not only brought citizens together but also promoted their allegiance to the state that governed them.¹⁷

In the late Seventeenth Century, John Locke proposed a dramatic change of thinking that furthered the adoption and spread of religious toleration and religious liberty. In his 1689 *Letter Concerning Toleration*,¹⁸ Locke challenged both prongs of the traditional justification for coercive religious establishments even as he reaffirmed the idea of religious truth.¹⁹ In so doing, Locke offered his own competing arguments, both religious-moral and political-pragmatic.

In his principal argument, Locke contended that the traditional religious-moral reasoning was flawed because, in reality, a coercive religious establishment does *not* conform to true religion. True Christianity, Locke argued, teaches that religious salvation requires inward sincerity and personal faith, meaning that “men cannot be forced to be saved.”²⁰ Coerced religion simply has no religious value. Accordingly, a state that compels religious observance engenders hypocrisy but does not honor God, and neither does it serve the religious well-being of individuals. Much to the contrary, a state honors the will of God and best serves individual religious well-being by permitting genuine religious observance as a matter of voluntary choice.²¹

More briefly, Locke also contested the political-pragmatic argument for coercive establishments. In a religiously pluralistic society, he suggested, religious toleration is politically and pragmatically preferable. Forcing dissenters to practice a religion they reject promotes resentment and anger, not social unity and religion-based support for the state. Conversely,

62 ME. L. REV. 23, 28 (2010); *see id.* at 28-29.

¹⁷From the time of the post-Constantinian Roman Empire, “it was a universal assumption that the stability of the social order and the safety of the state demanded the religious solidarity of all the people in one church.” Winfred E. Garrison, *Characteristics of American Organized Religion*, 256 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 16 (1948). This “theory of compulsory solidarity was . . . of Roman Catholic origin, . . . but it was also taken over by the major divisions of Protestantism in so far as these secured establishment as state churches.” *Id.* at 17.

¹⁸John Locke, *A Letter Concerning Toleration* (originally published 1689; William Popple trans.), in 33 GREAT BOOKS OF THE WESTERN WORLD 1 (Mortimer J. Adler ed., 2d ed. 1990).

¹⁹*See id.* at 4 (noting that there is “but one truth, one way to heaven”).

²⁰*Id.* at 10.

²¹*See id.* at 3-4, 10, 11. Antecedents of Locke's religious-moral argument for religious toleration can be found in Christian writings as far back as the third and fourth centuries. *See* E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 495-530 (2009).

tolerance for competing views gives citizens, including religious minorities, a sense of belonging that in turn promotes the state's interest in political stability and social peace. According to Locke, the social-glue argument fails as contrasted with the "greater . . . security of government where all good subjects, of whatsoever Church they be, without any distinction upon account of religion, enjoy[] the same favour of the prince and the same benefit of the laws, . . . [thus] becom[ing] the common support and guard of it."²²

II. LOCKE'S LEGACY: HISTORICAL AND CONTEMPORARY JUSTIFICATIONS FOR RELIGIOUS LIBERTY IN THE UNITED STATES AND ABROAD

Locke himself supported only a restricted regime of religious toleration,²³ but his arguments commonly and properly have been understood to support religious liberty more generally. Locke's arguments and variations upon them, moreover, have been used to promote religious liberty both in the United States and abroad. In early American history, for example, variants of Locke's religious-moral argument were advanced by Roger Williams, who pre-dated Locke, and later by Thomas Jefferson.

Roger Williams, who founded colonial Rhode Island in 1636 as a haven of religious liberty,²⁴ argued that "forced worship stinks in God's nostrils,"²⁵ whereas religious freedom—what Williams called "soul liberty"—is a human right precisely because it is a God-given right, no less than the right of a human to breathe.²⁶ More broadly, Williams promoted the separation of church and state for religious reasons—to protect religion from contamination and corruption. Thus, as Professor Mark DeWolfe Howe explained, Williams maintained that "government must have nothing to do with religion lest in its clumsy desire to favor the churches or its savage effort to injure religion it bring the corruptions of the wilderness into the holiness of the garden."²⁷

More than a century later, Thomas Jefferson authored the influential Virginia Act for Religious Freedom of 1786, which barred coerced religion and which declared religious freedom

²²Locke, *supra* note 18, at 19; *see id.* at 18-19; Durham, *supra* note 14, at 8.

²³Much like the contemporary constitutional doctrine of *Employment Div. v. Smith*, 494 U.S. 872 (1990), Locke called for the protection of religious belief and profession and for freedom from religious discrimination, but he rejected religion-based exemptions from generally applicable laws. *See* Locke, *supra* note 18, at 12-13, 15, 16. And even this limited degree of toleration seemingly did not extend, at least not fully, to Roman Catholics, Muslims, or nonbelievers. *See id.* at 17-18.

²⁴*See* WILLIAM G. McLOUGHLIN, *RHODE ISLAND: A HISTORY* 3-5 (1978).

²⁵PATRICIA U. BONOMI, *UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA* 35 (1986) (quoting Roger Williams).

²⁶*See* EDWIN S. GAUSTAD, *ROGER WILLIAMS* 95-96 (2005).

²⁷MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 149 (1965). For an elaboration of Roger Williams' rich and complex views, *see* TIMOTHY HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* (1997).

a natural right.²⁸ In support of the legislation, Jefferson offered various arguments, but he relied in part on a religious-moral justification that echoed Williams as well as Locke. According to the Act's preamble, "Almighty God hath created the mind free," and "all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness."²⁹ They "are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as it was in his Almighty power to do."³⁰ The state ought not confer privileges and incapacities on the basis of religious opinion, the preamble continued, because it "tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it."³¹

Religious-moral justifications for religious liberty dominated in the founding period,³² but variants of Locke's political-pragmatic argument also played a role. For instance, in his 1785 *Memorial and Remonstrance Against Religious Assessments*,³³ James Madison, like his colleague Jefferson, relied heavily on theological arguments in supporting religious liberty as a matter of natural law and unalienable right.³⁴ But he also emphasized the importance of religious equality, not only as a matter of natural right but also because it promotes peaceful coexistence and voluntary allegiance to the state. According to Madison, a coercive religious establishment tends to "destroy . . . moderation and harmony . . . amongst its several sects,"³⁵ generating religion-based resentment and divisiveness and sometimes religion-based violence.³⁶ This "malignant influence on the health and prosperity of the State" is an "enemy to the public quiet."³⁷ It invites widespread resistance by objecting citizens, which "tend[s] to enervate the laws in general, and to slacken the bands of Society."³⁸ By contrast, "[a] just government . . . will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."³⁹

²⁸See Virginia Act for Religious Freedom, VA. CODE ANN. § 57-1 (2008) (enacted Jan. 16, 1786).

²⁹*Id.* (preamble).

³⁰*Id.*

³¹*Id.*

³²See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 154-66 (1991).

³³James Madison, *Memorial and Remonstrance Against Religious Assessments* (originally published 1785), in MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 49 (2d ed. 2006).

³⁴Madison's basic natural law argument appears at the outset of the *Memorial and Remonstrance*. See *id.* at 49-50. But additional religious—and specifically Christian—arguments appear throughout the document.

³⁵*Id.* at 52.

³⁶See *id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Id.* at 51.

Religious-moral justifications for religious liberty, as advanced by Locke, Williams, Jefferson, and Madison, are theological and philosophical arguments of principle and logic. They do not depend upon cultural contingencies or contestable empirical claims. By contrast, the political-pragmatic arguments of Locke and later Madison are prudential arguments that are based upon a contestable empirical claim: that religious liberty will produce greater political stability and peace than will a regime of religious orthodoxy. The validity of this claim is likely to vary from one society to another, depending in part on the degree of religious pluralism in the society at hand: the greater the pluralism, the stronger the validity of the empirical claim.

In any event, these two forms of argument—religious-moral, on the one hand, and political-pragmatic, on the other—served as the foundations of religious liberty as it emerged in the United States. The full implications of these arguments were and remain a matter of debate. Read broadly, they require the state not only to offer vibrant protection for individual religious freedom but also to maintain a separation of church and state, perhaps including even our contemporary constitutional prohibition on governmental endorsement of preferred religious positions.⁴⁰ In any event, the arguments at least support religious liberty in the sense of freedom from coercive governmental action.

Religious liberty, albeit with significant variations, eventually gained broad acceptance not only in America but also in Europe and elsewhere. Today, it is recognized in most of the world's domestic constitutions.⁴¹ In addition, it is an international right. The Universal Declaration of Human Rights, dating from 1948, declares that “[e]veryone has the right to freedom of thought, conscience and religion,” including “freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”⁴² Similar language was adopted as part of the European Convention on Human Rights of 1953⁴³ and later was incorporated into a global treaty, the International Covenant on Civil and Political Rights.⁴⁴ Under these international provisions, as under the First

⁴⁰From a political-pragmatic perspective, the prohibition on endorsement might be understood to promote a religiously inclusive political community, thereby advancing religious harmony and political unity. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community . . .”). Conversely, one might argue that the pre-Lockean, social-gluce argument remains valid to a degree. According to this view, non-coercive, generalized symbolic support for religion can enhance societal and political unity. *Cf. Lee v. Weisman*, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting) (calling voluntary nonsectarian prayer in public ceremonies an “important unifying mechanism”).

⁴¹*See Durham, supra* note 14, at 9-10.

⁴²Universal Declaration of Human Rights, art. 18, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

⁴³European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9(1), 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

⁴⁴International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 18(1), 999 U.N.T.S. 171.

Amendment, religious belief is absolutely protected.⁴⁵ By contrast, and not surprisingly, states sometimes can justify the regulation of religiously motivated conduct, that is, conduct that “manifests” religious belief.⁴⁶ Whatever the limitations, however, religious liberty today is broadly recognized as a fundamental human right.⁴⁷

Religious liberty continues to rest on Lockean and related arguments, both religious-moral and political-pragmatic. And the spread of religious liberty, in turn, can be traced to the ever-broadening recognition that these arguments are sound. Indeed, Professor Durham contends that Locke’s political-pragmatic argument has become ever more persuasive in the face of continually expanding religious pluralism. Not only has pluralism increased within individual countries, it also has taken on an increasingly global dimension. On the global stage, every religion is a minority. As a result, religious believers, whatever their dominance domestically, are increasingly aware that their fellow believers are minorities in other countries and therefore need the protection of religious liberty. This sentiment adds an additional element to Locke’s political-pragmatic argument. According to Durham, it further supports the recognition of religious liberty as a “genuinely international right.”⁴⁸

III. RELIGIOUS SUPPORT FOR RELIGIOUS LIBERTY

What, then, of the first and primary prong of Locke’s reasoning, his religious-moral justification for religious liberty? Professor Durham contends that this argument, with variations, likewise has been increasingly accepted.⁴⁹ For Christianity, the Second Vatican Council (Vatican II) marked a crucial development. Through the Council’s 1965 *Declaration on Religious Freedom (Dignitatis Humanae)*,⁵⁰ the Roman Catholic Church declared that “the human person has a right to religious freedom” that “has its foundation in the very dignity of the human person, as this dignity is known through the revealed Word of God and by reason itself.”⁵¹ After Vatican II, Christianity in general, Protestant and Catholic alike, broadly embraced religious liberty as a

⁴⁵See W. COLE DURHAM, JR., & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* 165 (2010).

⁴⁶See *id.* at 231-34.

⁴⁷This is not to deny that religious liberty faces profound challenges in portions of the Islamic world and elsewhere, especially on such issues as proselytism, conversion, and blasphemy. See John Witte, Jr. & M. Christian Green, *Religious Freedom, Democracy, and International Human Rights*, 23 *EMORY INT’L L. REV.* 583 (2009).

⁴⁸Durham, *supra* note 14, at 1-2; see *id.* at 2, 11.

⁴⁹See *id.* at 10-11.

⁵⁰SECOND VATICAN COUNCIL, *DECLARATION ON RELIGIOUS FREEDOM (DIGNITATIS HUMANAЕ)* (1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

⁵¹*Id.*; see Charles E. Curran, *Religious Freedom and Human Rights in the World and the Church: A Christian Perspective*, in *RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS*, at 143, 151 (Leonard Swidler ed., 1986).

matter of religious-moral principle.⁵²

Non-Christian religious traditions, too, can and do offer religious-moral justifications for religious liberty. Judaism, for instance, can be understood to support religious liberty as a matter of Jewish theology. Thus, according to Rabbi David Novak, “the covenant between God and Israel did not become fully effective until the Jewish people voluntarily reaccepted it in the exile and during the days of the Second Temple,” and “the covenant between God and individual Jews [likewise is] not fully effective unless an individual Jew wants to be in the covenant under no external duress.”⁵³ “That is why,” Novak continues, “Jews have welcomed willing gentile converts *to* Judaism but have not detained those Jews wanting to depart *from* Judaism.”⁵⁴ Jewish theology, of course, is augmented by a tragic history of persecution, giving Jews additional and powerful reasons to support religious liberty.⁵⁵

Eastern religions likewise tend to be broadly tolerant and therefore broadly supportive of religious liberty. Traditional Hinduism, for example, is extremely tolerant. As a polytheistic religion, Hinduism recognizes not only the existence of multiple paths to the truth but also the possibility that no single path is perfect or complete.⁵⁶ Buddhism, if anything, is even more tolerant. According to Buddhism, there is no such thing as universal religious truth. Instead, the emphasis is on “suchness,” which recognizes and values the distinctiveness and particularity of everything in the universe, whether natural, divine, or human.⁵⁷ As Masao Abe has explained, Buddhism teaches that “you and I are equal in that each of us is realized in our own individuality and in our own personality. Exactly the same is true with the divine and the human.”⁵⁸ Buddhism therefore is inherently tolerant: “Since the realization of everything’s suchness or as-it-is-ness is itself the Buddhist faith, the deeper the Buddhist faith becomes the more tolerant the attitude toward other faiths. In Buddhism, deep faith and true tolerance do not exclude one another but go together.”⁵⁹

Islam presents a more complicated picture. Under a restrictive reading of the Islamic tradition, Muslims are free to practice Islam but not to convert to another religion; Jews and

⁵²See Curran, *supra* note 51, at 144, 145-53.

⁵³DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 79-80 (2009).

⁵⁴*Id.* at 80; *see id.* at 62-80.

⁵⁵Because Jews tend to be minorities wherever they reside, their support for religious liberty may rest in part on pragmatic self-interest. But even in Israel, which was established as a Jewish state, religious liberty is recognized, albeit with various complexities. See Asher Maoz, *Religious Human Rights in the State of Israel*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 14, at 349.

⁵⁶See Kana Mitra, *Exploring the Possibility of Hindu-Muslim Dialogue*, in RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS, *supra* note 51, at 109, 113.

⁵⁷See Masao Abe, *Religious Tolerance and Human Rights: A Buddhist Perspective*, in RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS, *supra* note 51, at 193, 196-97.

⁵⁸*Id.* at 197.

⁵⁹*Id.* at 198.

Christians, as “People of the Book,” are free to worship in private but not to proselytize; and all others, categorized as “Unbelievers,” are afforded little or no religious freedom at all.⁶⁰ But this restrictive view has been challenged from within, and it appears that Islam increasingly is understood to support a more generous regime of religious liberty. Mohamed A. Elsanousi cites the following passages from the Qur’an:

Let there be no compulsion in religion.⁶¹

If it had been thy Lord’s will, they would all have believed,- all who are on earth! wilt thou then compel mankind, against their will, to believe!⁶²

To you be your Way, and to me mine.⁶³

According to Elsanousi, these verses suggest a religious justification for religious liberty analogous to that offered by Thomas Jefferson in support of the Virginia Act for Religious Freedom.⁶⁴ Further, as Professor Ali Khan has explained, the Prophet Muhammed himself, following his migration from Mecca, established an Islamic state in Medina with a Constitution that permitted non-Muslims to practice their religion.⁶⁵ These arguments support the view of Professor Mohammed Hashim Kamali that religious liberty has been a precept of Islam from the very beginning.⁶⁶

Islamic support for religious liberty is neither universal nor unambiguous.⁶⁷ The

⁶⁰See Abdullahi A. An-Na’im, *Religious Minorities Under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1, 11-12 (1987).

⁶¹Qur’an 2:256; see Mohamed A. Elsanousi, *A Growing Economic Power: Muslims in North America and Integration and Contribution to Social Justice*, 9 J.L. SOC’Y 100, 111 (2008). Translations of the Qur’an are drawn from ABDULLAH YUSUF ALI, *THE MEANING OF THE HOLY QUR’AN* (10th ed. 1999).

⁶²Qur’an 10:99; see Elsanousi, *supra* note 61, at 111.

⁶³Qur’an 109:6; see Elsanousi, *supra* note 61, at 113.

⁶⁴See Elsanousi, *supra* note 61, at 111-15.

⁶⁵See Ali Khan, *Commentary on the Constitution of Medina*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY, at 205 (Hisham M. Ramadan ed., 2006). Medina included various tribes of Jews and pagans as well as Muslims. See *id.* at 206-08. According to Khan, the Medina Constitution is part of the Prophet’s Sunna, which is subordinate to the Qur’an but which here is fully compatible with Qur’anic principles. See *id.* at 208.

⁶⁶See MOHAMMAD HASHIM KAMALI, *FREEDOM OF EXPRESSION IN ISLAM* 87-89 (1997).

⁶⁷See ROBERT TRAER, *FAITH IN HUMAN RIGHTS: SUPPORT IN RELIGIOUS TRADITIONS FOR A GLOBAL STRUGGLE* 116-18 (1991). The constitutions of predominately Muslim countries, influenced by divergent understandings of Islam as well as other considerations, reflect a broad range of views concerning the role of Islam and Islamic law and concerning the status of religious freedom and other individual rights. See Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominately Muslim Countries*, 36 GEO. J. INT’L L. 947 (2005).

restrictive traditional understanding has not disappeared from view, especially on the question of Muslim apostasy.⁶⁸ Nonetheless, there are powerful currents within Islam that support religious liberty as a matter of religious-moral principle, even with respect to apostasy,⁶⁹ and additional “reform[] from within”⁷⁰ is likely to promote this view in the years that lie ahead.

Needless to say, not all religious believers support religious liberty. Religious believers can be quite intolerant. This may be true for certain religious fundamentalists, for instance, whether Christian, Islamic, or otherwise.⁷¹ Even so, there is broad and growing support for religious liberty on the basis of religious-moral principle, not only within Christianity but also within the other major religions of the world. This religious support for religious liberty is not merely political or pragmatic. Much to the contrary, it is grounded in powerful claims of ultimate reality—claims concerning the will of God or the call to spiritual fulfillment; claims concerning the dignity and individuality of each and every human being; and claims affirming religious liberty as an intrinsic (God-given or natural) human right. These are claims of religious truth, and they track Locke’s first and primary argument: that religious truth demands religious liberty.

Although religious believers of virtually all stripes can find religious-moral support for religious liberty within their particular traditions, secularists are a different story. As discussed below, there may be no persuasive *secular*-moral justification for religious liberty. As a result, secular support for religious liberty may rest entirely on Locke’s secondary, political-pragmatic justification: that religious liberty promotes political stability and social peace.

IV. CLOUDS ON THE HORIZON: THE CHANGING FACE OF RELIGION IN AMERICA

As I noted at the outset, America’s basic commitment to religious liberty remains intact. Moreover, this commitment is not likely to disappear anytime soon. Yet as I look to the future, I see clouds on the horizon.

Our commitment to religious liberty is not merely a product of the First Amendment’s text, nor even its historical underpinnings. Rather, it is a contemporary commitment, reflected, for example, in the broad congressional support for RFRA and RLUIPA. It is a commitment grounded in contemporary thinking—the thinking not only of judges but also of political leaders and of the citizens they represent. It is grounded in the belief, accepted by most Americans, that religious liberty *deserves* protection as a fundamental human right. In other words, it rests on the normative appeal of religious liberty, not merely in the past but today. And if this contemporary commitment ever disappears, the substance of religious liberty is likely to follow. Religious

⁶⁸See ABDULLAH SAEED & HASSAN SAEED, FREEDOM OF RELIGION, APOSTASY AND ISLAM (2004).

⁶⁹See, e.g., Mohamed Talbi, *Religious Liberty: A Muslim Perspective*, in RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS, *supra* note 51, at 175.

⁷⁰See An-Na’im, *supra* note 60, at 17 (urging such reform).

⁷¹See Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1219-24 (2005).

liberty might remain a formal part of our constitutional and legal structure, but, in practical reality, it might gradually wither away, no longer generating distinctive or meaningful constitutional or legal protection.

The substance of religious liberty is linked to its persuasive appeal, and, as I have discussed, its persuasive appeal rests upon a combination of religious-moral and political-pragmatic reasoning. These two sorts of justifications, with variations in their specifics, were persuasive to Americans in the past, and they remain so today. But will they persuade in the future? Four developments and trends in the American religious landscape may bear on this question.

A. Diversification

First, religion in America has become radically diverse, and it is likely to become even more so in the decades that lie ahead. As Professor Stephen J. Stein has explained, the history of American religion has been a story of ever-increasing religious diversity.⁷² There was significant diversity from the beginning, although (apart from the indigenous Native American population) it was confined mainly to competing Protestant denominations and sects.⁷³ As immigration patterns changed, large numbers of Roman Catholics came to the United States, which dramatically changed the religious composition of the society. By the time of the Civil War, the Roman Catholic Church had become the largest religious denomination in the country, and it grew even further in the decades that followed.⁷⁴ There was significant Jewish immigration as well.⁷⁵ America was no longer a Christian nation, much less a Protestant nation.

In the 1950s, Professor Will Herberg described American religion in terms of “Protestant-Catholic-Jew.”⁷⁶ This was a largely accurate characterization at the time, but Herberg could not anticipate later developments, including new waves of immigration from Asia, Africa, and Latin America, that have rendered it woefully incomplete. Today, as Professor Diana L. Eck argues, the United States may be “the most religiously diverse nation on earth.”⁷⁷ As in the past, there are significant denominational and theological differences within the various subgroups of Christians and Jews. But unlike in the 1950s, today we have as many Muslims as Jews, along

⁷²See Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 *IND. L.J.* 37, 41-52 (2000). Professor Stein’s account is considerably more complete and nuanced than the brief summary I offer here.

⁷³See *id.* at 41-43.

⁷⁴See *id.* at 45-46, 48.

⁷⁵See *id.* at 45.

⁷⁶WILL HERBERG, *PROTESTANT-CATHOLIC-JEW* (1955).

⁷⁷DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS NOW BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION* 4 (2001); see *id.* at 4-5 (“[N]owhere, even in today’s world of mass migrations, is the sheer range of religious faith as wide as it is today in the United States.”).

with a large and complex array of Buddhists and Hindus.⁷⁸ Other religious traditions are well represented as well, including, among others, Jain, Sikh, Zoroastrian, African, and Afro-Caribbean.⁷⁹ And Christianity and Judaism have not escaped the diversifying effects of immigration. To note but one example, Roman Catholicism has taken on an increasingly Hispanic flavor.⁸⁰ Moreover, as we look to the future, there is no reason to believe that America's "exploding religious pluralism"⁸¹ will not continue. If anything, this trend is likely to accelerate as the demographics of the nation continue to evolve.

B. Modernization

Second, beyond these dramatic changes in formal religious affiliation, the forces of modernity have acted and continue to act within the various faiths, promoting increasingly modernized versions of religion, versions that comfortably coexist with modern science and secular rationality. Calling oneself a Christian or a Jew or a Sikh is one thing; the actual character of one's beliefs and practices is something else. Within American Christianity, for example, many Americans continue to adhere to classic understandings of the faith, whether Roman Catholic or Protestant. Many others, by contrast, count themselves Christians even though their beliefs are decidedly unorthodox, certainly by historical standards. To a significant extent, these revisionist belief structures are modernized—in a sense, secularized—versions of Christianity. They are attractive to individuals who wish to embrace the tradition and ethics of Christianity despite their skepticism concerning the otherworldly and miraculous aspects of the faith, including the existence of a personal, omnipotent, and transcendent God.

Modernized, metaphorical understandings of religion are not new. Within American Protestantism, for example, liberal theologians began moving in this direction as far back as the Nineteenth Century.⁸² By the 1940s, Paul Tillich went further, famously proclaiming that God should no longer be understood "as a projection 'out there' or beyond the skies but as the ground of our very being."⁸³ And "if that word [God] has not much meaning for you," Tillich continued, "translate it, and speak of the depths of your life, and the source of your being, of your ultimate concern, of what you take seriously without any reservation."⁸⁴ In recent decades, modernized understandings of religion have become increasingly common, especially within mainline Protestantism but also more generally. As Frederick Mark Gedicks and Roger Hendrix report, it is not unusual today for mainline Protestants—and to some extent even evangelicals—to be

⁷⁸*See id.* at 2-4.

⁷⁹*See id.* at 1, 4. There are far too many smaller religious groups to mention. For comprehensive documentation and detailed discussion, see MELTON'S ENCYCLOPEDIA OF AMERICAN RELIGIONS (J. Gordon Melton ed., 8th ed. 2009).

⁸⁰*See ECK, supra* note 77, at 3, 45.

⁸¹Stein, *supra* note 72, at 52.

⁸²*See* GEORGE M. MARSDEN, UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM 32-36 (1991).

⁸³PAUL TILlich, THE SHAKING OF THE FOUNDATIONS 57 (1948).

⁸⁴*Id.*

“skeptical about the divinity of Jesus, oppose literal-historical understandings of the Bible, and reject Jesus’s miracles, including the resurrection.”⁸⁵ These individuals, among others, fall into a group of Americans that Gedicks and Hendrix provocatively label the “barely believing.”⁸⁶ The increasing prevalence of such religious understandings, whether Christian or otherwise, represents an important development that is likely to continue.

C. Individualization

Third, American religion has been and continues to be transformed in a related but distinctive way: it is becoming increasingly individualistic. Thus, Americans are crafting their own understandings of religion, understandings that do not conform to the conventional beliefs and practices of any particular religious body or any particular religious faith. In their celebrated book, *Habits of the Heart*,⁸⁷ Professor Robert N. Bellah and his coauthors identified a paradigmatic example of this tendency in a young woman the authors interviewed, a woman they called “Sheila Larson.” Asked to describe her faith, Sheila, although affirming a generalized belief in God, named her religion after herself. “It’s ‘Sheilaism,’” she said, “just my own little voice.”⁸⁸ Sheila did not attend church, and, for her, believing in God did not carry a conventional religious meaning.⁸⁹ Indeed, people like Sheila, whether or not they claim to believe in God, increasingly avoid the word “religious” altogether, describing themselves instead as “spiritual,” perhaps in part to avoid the implication that they feel bound by religious convention.⁹⁰

In any event, as Professor Gedicks has explained, spirituality—even for a person who continues to claim a religious identity or affiliation—tends to displace religion as traditionally understood. Traditional religion rests upon “teachings and doctrines conform[ing] to an external and ultimate divine reality,” a “reality beyond the temporal self.”⁹¹ Spirituality, by contrast, calls for an inwardly directed search for meaning, a “revelation of the immanent, rather than the transcendent.”⁹² As Professor Rebecca French has concluded, this “move towards a personalized spirituality,” with individuals constructing their own belief structures and “designer Gods,” is an ongoing development no less dramatic than other recent changes in the American religious

⁸⁵Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 288 (2007).

⁸⁶*Id.* at 287.

⁸⁷ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

⁸⁸*Id.* at 221.

⁸⁹*See id.*

⁹⁰*See Stein, supra* note 72, at 58. In a 2009 survey, a remarkable 30 percent of Americans described themselves as “spiritual but not religious.” *See Daniel Stone, One Nation Under God?*, NEWSWEEK, Apr. 7, 2009, available at <http://www.newsweek.com/2009/04/06/one-nation-under-god.html>.

⁹¹Gedicks, *supra* note 71, at 1218, 1219.

⁹²*Id.* at 1219; *see id.* at 1215-19; *cf.* ROBERT WUTHNOW, *AFTER HEAVEN: SPIRITUALITY IN AMERICA SINCE THE 1950S* 3 (1998) (“people have been losing faith in a metaphysic that can make them feel at home in the universe” and have been increasingly driven toward a “spirituality of seeking”).

landscape.⁹³

D. Secularization

Fourth, and finally, there are growing numbers of Americans who are frankly and openly secular, abandoning religious or spiritual outlooks or practices altogether. Americans remain far more religious and religiously active than citizens in other Western countries, but our unusual degree of religiosity may not be enduring. According to Trinity College's 2008 American Religious Identification Survey (ARIS),⁹⁴ a dramatic decline in religious identification and practice has occurred over the last two decades.⁹⁵ In 1990, only 8.1 percent of Americans identified their religion as "none," "atheist," "agnostic," "secular," or "humanist."⁹⁶ By 2008, the percentage of these so-called "Nones" had almost doubled to 15 percent, which is nearly a sixth of the American population and which far exceeds the combined total of all non-Christian religious groups in the United States.⁹⁷ Most of the growth in "Nones" occurred in the 1990s,⁹⁸ but it is notable that in the 2008 survey, young adults, ages 18 to 29, were especially inclined to self-identify in this fashion, with 22 percent falling into this category.⁹⁹ According to the ARIS researchers, trend lines suggest that in another twenty years "Nones" could constitute as much as a quarter of the overall American population.¹⁰⁰

These statistics are more complex than they might seem. As the researchers explain, only a small percentage of the "Nones" are atheists, and, indeed, about a fourth of them are theists who affirm a personal God even though they reject conventional religious labels.¹⁰¹ (Perhaps "Sheila," for example, would self-identify as a "None.") Even so, a broad majority of "Nones"

⁹³Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFF. L. REV. 127, 162, 167 (2003); *see id.* at 162-67. The contemporary trend toward individualistic religion can be seen to have deep historical roots, in what Charles Taylor has described as the turn toward inwardness in Western understandings of morality. *See* CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* 109-207 (1989).

⁹⁴*See* BARRY A. KOSMIN & ARIELA KEYSAR, *AMERICAN RELIGIOUS IDENTIFICATION SURVEY [ARIS 2008]: SUMMARY REPORT* (2009), available at http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf.

⁹⁵*See* BARRY A. KOSMIN ET AL., *AMERICAN NONES: THE PROFILE OF THE NO RELIGION POPULATION, A REPORT BASED ON THE AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2008* (2009), available at http://www.americanreligionsurvey-aris.org/reports/NONES_08.pdf.

⁹⁶*Id.* at 20 (figure 3.1). The question was "What is your religion, if any?" Individuals who responded with any of the five responses noted in the text were combined to form a group the researchers called the "Nones." Both in 1990 and in 2008, the ARIS researchers asked this and other questions of representative samples of American adults. *See id.* at ii (discussing survey methodology).

⁹⁷*Id.* at 20 (figure 3.1); *see id.* at i.

⁹⁸*See id.* at 20.

⁹⁹*Id.* at 17 (figure 2.1).

¹⁰⁰*See id.* at 22.

¹⁰¹*Id.* at 11 (figure 1.13).

are rational skeptics who reject theism. Thus, 7 percent are atheists; 35 percent are agnostics; and 24 percent are deists who deny the existence of a personal God.¹⁰²

Beyond the question of religious self-identification, the ARIS survey included additional questions relating to specific beliefs and practices. One important finding, for example, is that fully 27 percent of all Americans—regardless of their stated religious affiliation—said that they did not expect to have a religious funeral when they die.¹⁰³ This statistic speaks volumes about the declining significance of traditional religious worldviews in the United States, even for individuals who may continue to self-identify as “religious.” As Barry Kosmin, coauthor of the ARIS study, observes, “If you don’t have a religious funeral, you’re probably not interested in heaven and hell.”¹⁰⁴

It would be wrong to overstate the significance of the ARIS findings, but it seems that secularization, long anticipated in the United States, finally is making significant inroads. America remains a broadly religious society. We are not Western Europe. But we may be moving slowly in that direction—in part through self-proclaimed hostility or indifference to religion but also in more subtle ways. As I suggested in discussing the trend toward modernized religion, secularization can work within religion as well as outside it. It can act to demythologize conventional religious claims, including supernatural claims about miracles, the afterlife, and divine intervention in human affairs. As such, its effects include the rise of metaphorical understandings of religion, agnostic views about God, and deist beliefs, even among persons who continue to claim conventional religious affiliations. Deist beliefs or tendencies, for example, can be found in nearly 30 percent of mainline Protestants and Roman Catholics and in more than 40 percent of Jews.¹⁰⁵ More broadly, those holding secularized beliefs—whether or not they affirm some notion of God or a higher power—are likely to deny or reject any personal relationship with God, any role for God in their own or the world’s temporal affairs, and any need to honor a distinctively religious set of moral or ethical commands, understood as transcendent, externally imposed duties or obligations.

V. CAN RELIGIOUS LIBERTY SURVIVE?

To recapitulate, contemporary American society has undergone and continues to undergo

¹⁰²*Id.* The researchers sub-divide the 35 percent of “Nones” who are agnostics into “hard agnostics” (those who say “there is no way to know” about the existence of God) (19 percent of the “Nones”) and “soft agnostics” (those who say “I’m not sure” about the existence of God) (16 percent). *Id.*

¹⁰³*Id.* at 13 (figure 1.16); *see id.* at 12-13. Among “Nones,” 66 percent responded in this manner. *See id.*

¹⁰⁴*Survey: U.S. Grows Less Religious, Less Christian*, CHRISTIAN CENTURY, Apr. 7, 2009, at 15 (quoting Barry Kosmin).

¹⁰⁵*See* BAYLOR INSTITUTE FOR STUDIES OF RELIGION, AMERICAN PIETY IN THE 21ST CENTURY: NEW INSIGHTS INTO THE DEPTH AND COMPLEXITY OF RELIGION IN THE US 27, 30 (2006), available at <http://www.baylor.edu/content/services/document.php/33304.pdf> (finding that one in four Americans—including nearly 30% of mainline Protestants and Roman Catholics and over 40% of Jews—believe in a “Distant God” who is not active in the world).

four significant and interrelated developments: first, a radical increase in religious diversity as measured by religious identification or affiliation; second, the modernization of traditional faiths, with rationalism and metaphor tending to displace the supernatural, miraculous, and otherworldly aspects of religion; third, the individualization and “spiritualization” of religion, including a turn toward the self and away from transcendent or even group-based religious norms; and fourth, the increasing secularization of individual belief structures, not only among professed nonbelievers but also among individuals who continue to claim a religious identification or affiliation. These four trends, taken together, have important implications for religious liberty.

A. Threats to Religious Liberty’s Political-Pragmatic Foundation

One thing is clear from the first trend but also from the others: American religion today is astonishingly diverse, not only in formal religious identification but also, and even more, in the broad range of religious and spiritual beliefs that individuals actually hold. At first glance, this dramatic increase in religious diversity should offer enhanced support for religious liberty under the political-pragmatic justification originally advanced by Locke in his second argument. As suggested earlier, the greater the degree of religious pluralism, the stronger the argument that religious liberty will further political stability and social peace. To the extent that the state embraces religious liberty, it signals its respect for the beliefs and practices of religious individuals (and of secular individuals likewise), including those holding minority or unconventional views. This leads in turn to their reciprocal respect and support for the state and to harmony within society. As the population of religious minorities and nonconformists grows, so, too, does the positive societal impact of religious liberty.

Locke’s political-pragmatic argument makes good sense, and it has strongly influenced the spread of religious liberty. But there may be a point of diminishing returns, or even a point at which radical religious pluralism leads instead to a contrary political-pragmatic position. As Professor Stein has noted, religious diversity in the contemporary United States is “genuinely bewildering,”¹⁰⁶ making free exercise “a glorious principle” but “a wild thing” in practice.¹⁰⁷ Even if religious liberty can promote societal harmony and peace, implementation difficulties may become too great and the practical costs too high.

Two practical problems loom large: the legal definition of “religion” and, relatedly, the societal costs of extending protection to all manner of “religiously” motivated conduct. Amid the welter of contemporary belief systems, it has become increasingly difficult to define “religion” in any coherent fashion.¹⁰⁸ For purposes of religious liberty, one could attempt to confine “religion” to conventional understandings, but that path seems increasingly arbitrary. “Conventional” religious believers—mainline Protestants and liberal Catholics, for example—may forego otherworldly explanations and guide their behavior by rational inquiry. Meanwhile, “spiritual”

¹⁰⁶Stein, *supra* note 72, at 41.

¹⁰⁷*Id.* at 60.

¹⁰⁸See GRIFFIN, *supra* note 13, at 15-35; Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 28-32 (2000).

believers may feel conscientiously obliged to honor “designer Gods” of all sorts.¹⁰⁹

In today’s America, writes Stein, “[r]eligion has become whatever a person declares to be the object of regard or pursuit.”¹¹⁰ A principled approach to religious liberty perhaps could limit “religion” to claims of conscience, but it otherwise might require a “fluid definition”¹¹¹ along the lines that Stein suggests. Yet if “religion” extends so broadly, why should avowedly secular claims—claims of personal autonomy, for example—not be treated likewise?¹¹² And even if secular claims are somehow excluded, the “religion” that remains would nonetheless be capacious—arguably too broad to permit any serious degree of constitutional or legal protection.

These practical problems, of course, already have influenced the direction of constitutional doctrine under the Free Exercise Clause, including the Supreme Court’s restrictive decision in *Employment Division v. Smith*,¹¹³ which ruled that religiously motivated conduct generally is not entitled to presumptive constitutional protection. Departing from prior doctrine, the Court reasoned that such protection was impractical in a nation ““of almost every conceivable religious preference””¹¹⁴ and that, indeed, affording such protection would be “courting anarchy,” a “danger [that] increases in direct proportion to the society’s diversity of religious beliefs.”¹¹⁵ In the future, these practical considerations could threaten religious liberty more generally. For example, concerns similar to those expressed in *Smith* could influence the interpretation of religious liberty statutes such as RFRA and RLUIPA, or they might some day lead to their repeal, or perhaps their judicial invalidation under the Establishment Clause.¹¹⁶

B. Threats to Religious Liberty’s Religious-Moral Foundation

The societal developments I have identified also bear upon Locke’s first and primary argument for religious liberty—his religious-moral justification—as well as Christian and non-Christian variants of that argument. Whatever its particular formulation, Christian theology, at bottom, supports religious liberty on the ground that Christianity demands it as a matter of religious truth. In other words, God demands it. Non-Christian religious traditions offer

¹⁰⁹*Cf.* WUTHNOW, *supra* note 92, at 2 (“Spirituality has become a vastly complex quest in which each person seeks in his or her own way.”).

¹¹⁰Stein, *supra* note 72, at 58.

¹¹¹*Id.*

¹¹²*Cf.* William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319-23 (1991) (contending that religious belief systems should not receive greater constitutional protection than non-religious belief systems).

¹¹³494 U.S. 872 (1990).

¹¹⁴*Id.* at 888 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

¹¹⁵*Id.*

¹¹⁶*Cf.* Ira C. Lupu & Robert Tuttle, *Free Exercise Exemptions and Government Decision-Making Competence*, 32 CARDOZO L. REV. ____ (forthcoming 2011) (suggesting that the Establishment Clause could be construed to invalidate religious liberty statutes, including RFRA in its federal applications, as well as state constitutional doctrines authorizing religious exemptions from otherwise applicable laws).

distinctive rationales but nonetheless support—or can be understood to support—religious liberty on the basis that it is required as a matter of religious truth and therefore as a matter of core conviction. As a result, the rise of an increasingly non-Christian religious pluralism in the United States need not impair the religious-moral case for religious liberty.

The other trends I have noted, however, may undermine the vitality of these religious-moral justifications. These trends include a rising secularism in individual belief structures, not only among professed nonbelievers but also among individuals who continue to claim a religious identification or affiliation. Relatedly, those claiming traditional religious identifications, for example, mainline Protestants, may understand religion in modernistic, metaphorical ways, effectively limiting themselves to beliefs that are consistent with secular rationality. The remaining trend, the individualization and spiritualization of religious beliefs, likewise reflects a decline in traditional understandings of religion.

Rising secularism, by definition, undercuts any *religious*-moral argument for religious liberty.¹¹⁷ This plainly is true for overt secularists, who have no religious tradition or religious resources upon which to draw.¹¹⁸ Metaphorical religious believers do have a religious tradition and resources upon which to draw, but their modernistic religious understandings may or may not generate a profound or fundamental commitment to religious liberty, a commitment akin to Roger Williams' belief that coerced religion "stinks in God's nostrils."¹¹⁹ Religious or spiritual believers holding individualized belief structures, by contrast, tend to reject or distrust traditional religious theology and doctrines altogether, presumably including the traditional religious rationales for religious liberty. In fact, their detachment from organized religion increases the likelihood that they are completely unaware of these traditional rationales. Given their distrust of traditional religion, moreover, they are likely to reject any distinctive constitutional or legal

¹¹⁷In addition to rising secularism, recent decades have witnessed an increasing privatization of religion and corresponding secularization of legal and public discourse. As Professor Steven D. Smith has explained, the secularization of legal and public discourse should be distinguished from secularization as such, but it, too, tends to impair the viability of religious-moral justifications for religious liberty. See Smith, *supra* note 32, at 167-96; see also STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 107-50 (2010) (arguing that secular discourse is subverting religious freedom by rendering its justification incoherent).

¹¹⁸Professor Alan E. Brownstein has argued that secularists might be persuaded by a religious-moral argument for religious liberty, or at least by an argument that bridges religious and secular understandings. See Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504, 515-23 (2003). Brownstein contends that the most broadly persuasive religious-moral argument for religious liberty is one that conceptualizes religious duties as emanating not from externally imposed commands but rather from internally derived, relational obligations to the divine, obligations grounded on a relationship of love. See *id.* at 517-21. Secularists, he suggests, are more likely to understand the importance of loving relationships and the duties that they inspire. See *id.* at 521-23. Brownstein's argument is imaginative and helpful. It might persuade some secularists, mitigating the effect that I describe in the text.

¹¹⁹See *supra* note 25 and accompanying text.

protection for religious beliefs or practices as such,¹²⁰ although they might well support a more generalized protection of personal freedom and individual autonomy.¹²¹

C. *A Secular-Moral Foundation for Religious Liberty?*

Declining support for religious liberty as a matter of religious-moral principle might not be cause for concern if there were a persuasive *secular*-moral justification for religious liberty. But it is doubtful that such a justification exists.

Whether *any* human rights can be defended on the basis of secular morality is an open question. As Professor Robert Traer has written, “faith in human rights reflects a convergence of the religious wisdom of the world . . . , affirming a ‘higher law’ [that] recognizes the dignity of the human person as the purpose and standard of all law.”¹²² According to Traer, “It is faith in the power of love, which [Martin Luther King, Jr.] described as a ‘Hindu-Muslim-Christian-Jewish-Buddhist belief about ultimate reality.’”¹²³ Human rights are grounded in the inherent dignity and inviolability of each and every human being, without exception. As Professor Michael J. Perry has explained, these fundamental premises can readily be justified by religious worldviews, including, for example, worldviews that include the belief that every human being is a child of God who warrants our love and respect as a sacred and beloved brother or sister.¹²⁴ Conversely, Perry continues, despite the arguments of prominent philosophers, it is not at all

¹²⁰According to Professor Gedicks, “the instinct of spirituality is for religious liberty in its classic form, as the residuum of governmental absence.” Gedicks, *supra* note 71, at 1234. By this, however, Gedicks means nothing more than a restrictive, nondiscrimination approach to the Free Exercise Clause, as expounded in *Employment Div. v. Smith*, 494 U.S. 872 (1990). See Gedicks, *supra* note 71, at 1226-29, 1234. Gedicks does not discuss religious liberty statutes such as RFRA and RLUIPA, which authorize religion-based exemptions from nondiscriminatory laws, but his argument implies that these statutes are problematic if not unconstitutional in an era of increasing spirituality and declining traditional religion.

¹²¹In selected settings, the Supreme Court has extended constitutional protection to individual autonomy, whether religiously informed or not. Notably, the Court’s reasoning has included the language of individual self-definition and spirituality. In protecting abortion decisionmaking, for example, the Court has cited “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” as well as a woman’s right to determine her “own conception of her spiritual imperatives.” *Planned Parenthood v. Casey*, 505 U.S. 833, 851, 852 (1992).

¹²²TRAER, *supra* note 67, at 219-21.

¹²³*Id.* at 221 (quoting Martin Luther King, Jr., *A Time to Break Silence*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.*, at 231, 242 (James Melvin Washington ed., 1986)).

¹²⁴See MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS* 7-13 (2007). An expansive interpretation of the Establishment Clause might suggest that religious-moral arguments along these lines cannot be used to justify the recognition of human rights in the American legal system, but such an interpretation would be seriously misguided. See Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 *TEX. REV. L. & POL.* 41, 64-67 (2003).

clear that secular morality is up to the task.¹²⁵

Even assuming, pace Perry, that *some* human rights can be grounded in secular morality, *religious liberty* is a separate and even more difficult question. Religious liberty calls for special and distinctive protection for beliefs and practices that secular thinkers do not regard as special or distinctive, certainly not in a positive way.¹²⁶ As a result, secular-moral arguments for religious liberty are likely to founder.¹²⁷ Indeed, if Professor Steven D. Smith is correct, under “the constraints of modern secular discourse . . . there simply is no good justification for treating religion as a special legal category.”¹²⁸

The best secular case for religious liberty might rest on a combination of political-pragmatic and secular-moral justifications. Professor Douglas Laycock, for example, has argued that religious liberty protects a fundamental component of personal autonomy, promotes societal peace, and removes the government from issues over which it generally has little or no legitimate interest.¹²⁹ Arguments of this sort certainly have force, but, when analyzed closely, their rationales tend to point toward a zone of liberty that is not confined to religious beliefs and conduct. As a result, they tend not to support religious liberty as a special and distinctive human right.¹³⁰ In any event, it seems doubtful that any combination of political-pragmatic or secular-moral arguments could provide as potent a justification for religious liberty as do arguments

¹²⁵See PERRY, *supra* note 124, at 14-29. Perry concedes that apart from arguments of morality, there are political-pragmatic arguments (what he calls “self-interested” arguments) for the protection of human rights, but he doubts their sufficiency. See Michael J. Perry, *Secular Worldviews, Religious Worldviews, and the Morality of Human Rights*, in THE ROUTLEDGE COMPANION TO THEISM (Charles Taliaferro et al. eds., forthcoming), available at <http://ssrn.com/abstract=1615690>, at 20-22. Cf. GLENN TINDER, LIBERTY: RETHINKING AN IMPERILED IDEAL 118 (2007) (“That every person without exception must be respected is probably the central principle of Western morality . . . [but] [i]t is uncertain . . . whether that principle can survive if it comes to depend on reason alone, unsupported by faith.”).

¹²⁶See Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMM. 1 (2008) (contending that there is no principled argument for tolerating religion except as part of a broader liberty of conscience and that, even within that broader category, religion’s distinguishing features may suggest the need for greater limits, not greater tolerance).

¹²⁷See STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 77-117 (1995); cf. Griffin, *supra* note 16, at 32-34, 44 (offering a non-religious, Rawlsian justification for constitutional toleration, but explaining that this argument would confine religious liberty to the restrictive, nondiscrimination approach of *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

¹²⁸Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1884 (2009) (book review); see *id.* at 1883-87.

¹²⁹See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 316-23 (1996).

¹³⁰See Smith, *supra* note 32, at 196-223 (systematically critiquing secular arguments for religious liberty, including arguments similar to Laycock’s, and finding them insufficient to justify distinctive protection for religious liberty as such).

grounded in the deep convictions of religious morality.¹³¹

CONCLUSION

The Lockean revolution fueled the emergence and growth of religious liberty. Due to the increasingly widespread acceptance of religious-moral justifications combined with an increasingly persuasive political-pragmatic justification, religious liberty rested on foundations that seemed ever more secure. By the late Twentieth Century, these foundations were sufficient to support a vibrant regime of religious liberty in the United States, including distinctive constitutional and legal protection for religiously motivated conduct, even in the context of neutral, nondiscriminatory laws. *Employment Division v. Smith*¹³² marked a step in the opposite direction, but RFRA and RLUIPA, combined with state-law developments, countermanded *Smith* to a substantial degree. More generally, some twenty years after *Smith*, America's basic commitment to religious liberty remains intact.

Even so, it seems that a counter-revolution is underway. The political-pragmatic justification for religious liberty is being tested by radical religious and spiritual pluralism. More important, the religious-moral foundation of religious liberty—its strongest pillar of support—is being slowly eroded by the forces of secularization and by the decline of traditional religious understandings. Religious liberty might survive for a time, perhaps for decades, as an inherited commitment. But if the counter-revolution continues, it may lead to a far less generous regime of religious liberty and, eventually, the complete demise of religious liberty as a distinctive constitutional or legal right. Viewed in this light, *Smith* might be a forerunner of far more dramatic developments to come.

It is commonplace to observe that American religious liberty, including the separation of church and state, has served religion well, supporting and nourishing one of the most religious societies in the Western world.¹³³ But I suspect that the causal link runs mainly in the opposite direction: it is America's vibrant religiosity that has promoted and supported the cause of religious liberty. And as our religiosity declines, so, too, might our support for religious liberty. We might retain a strong—and potentially even stronger—separation of church and state, but it might no longer be linked to religious liberty. Rather, it might be grounded on distrust of religion, or even hostility toward it. And religious free exercise, in the form of distinctive protection for religiously motivated beliefs and conduct, might gradually fade from view.¹³⁴

¹³¹*Cf.* Laycock, *supra* note 129, at 323 (conceding that his secular defense of religious liberty “may seem thin to some” but claiming that “thick or thin, its great advantage is that it is not dependent on beliefs about religion”).

¹³²494 U.S. 872 (1990).

¹³³*See, e.g.,* *McCreary Co. v. ACLU*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

¹³⁴If Europe is a harbinger for the United States, we might eventually come to justify the suppression of religious practices even through overtly discriminatory laws and even when the religious practices are purely symbolic. Some European countries have moved in this direction, and the European Court of Human Rights has suggested that secularism itself can be a legitimate justification for such laws. The

I earnestly hope that religious liberty can survive over time. But preserving religious liberty will require more than vigilance.¹³⁵ It will require us to reaffirm, reclaim, or replace the justifications that have long supported it.¹³⁶ The threats of the future are real, and I am not optimistic. I fear that religious liberty, understood as a distinctive and precious human right, our “first freedom,”¹³⁷ might become a relic of the past—perhaps a cherished relic, but one that no longer commands a contemporary commitment.

most striking example is *Sahin v. Turkey*, 44 Eur. Ct. H.R. 5 (2005). In *Sahin*, on an overwhelming vote of 16-1, the court approved a Turkish regulation barring university students from wearing Islamic headscarves, finding that the intrusion on religious freedom was justified because it promotes secularism as well as gender equality. *See id.*, ¶¶ 37-41. In its opinion, the court noted another highly publicized European law, the 2004 French law prohibiting the wearing of conspicuous religious apparel or symbols by public school students, and it suggested that the French law, like the Turkish regulation, was justified by “the principle of secularism.” *See id.*, ¶ 18.

¹³⁵Invoking the First Amendment, without more, will not be enough. *See Smith, supra* note 32, at 224. *But cf. Laycock, supra* note 129, at 314 (contending that constitutionalism demands that we respect the First Amendment, whatever its underlying rationale, and that the Amendment itself thus gives us “sufficient reason to vigorously protect religious liberty”).

¹³⁶*Cf. Brownstein, supra* note 118, at 515-23 (suggesting that we should move toward defending religious liberty on the basis of arguments that bridge religious and secular rationales).

¹³⁷*See Michael W. McConnell, Why Is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243 (2000).