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Steven D. Smith*

Ever since the Peace of Westphalia, or in any case since the Enlightenment, or possibly from the enactment of the American Constitution, or at least since the early twentieth century, or most definitely over the last couple of decades or so, it has been accepted in western nations and their progeny, among dominant minorities anyway (to borrow a term[1]), that governments and the laws they impose must be "secular" (whatever that means).[2] This requirement of governmental secularity has been argued for, or at least asserted, or in any case assumed, in law[3] and in political theorizing.[4] "[T]here is a broad consensus," Jocelyn Maclure and Charles Taylor approvingly report, "that 'secularism' is an essential component of any liberal democracy composed of citizens who adhere to a plurality of conceptions of the world and of the good . . . ."[5]

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1 *See infra* note 51 and accompanying text.

2 For an illuminating discussion of the historically shifting meanings of the term"secular," see Nomi Stolzenberg, *The Profanity of Law, in* LAW AND THE SACRED 29, 35 (Austin Sarat et al. eds., 2007). For essays considering the varieties of meanings that the term carries globally today, see RETHINKING SECULARISM (Craig Calhoun et al. eds., 2011).

3 *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (declaring that laws must have secular purposes and primarily secular effects).

4 *See, e.g.*, ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000) (discussing necessity of secular government in free societies); s*ee also infra* note 19 and accompanying text (discussing secular sources of government legitimacy).

5 JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 2 (Jane Marie Todd trans., 2011).

The requirement of secular government has been central to what I will call the prevailing "paradigm of legitimacy." Governments or laws that transgress the requirement by straying beyond the secular and lapsing into "religion" (whatever that is[6]) thereby imperil their legitimacy and compromise their claim on their subjects' respect and obedience. Or at least so it has been widely supposed.

The secular paradigm as a basis of political and legal legitimacy was not always in place,[7] however, and it is not foreordained that the paradigm always *will be* in place. On the contrary, there are indications that the paradigm is already losing its grip—that it may even be in a condition of crisis, or breakdown. Thus, Rajeev Bhargava argues for a rehabilitation of secularism precisely because, as he observes, "[o]nly someone with blinkered vision would deny the crisis of secularism."[8]

This Essay explores this perceived crisis. Part I discusses the nature of a "paradigm of legitimacy." Part II outlines the strategies of assimilation and marginalization that historically have supported such paradigms and, borrowing from the work of Thomas Kuhn and Arnold Toynbee, considers the paradigm shifts that can occur when these strategies prove ineffective. Part III illustrates these observations by reviewing the process by which, beginning in the fourth century, a Christian paradigm replaced an earlier Roman one and then in turn was displaced by a more secular view. These first three Parts are a prelude to Part IV, the longest in the essay, which discusses the rise of the secular paradigm, the strategies that have supported it, the increasing futility of those strategies, and the consequent present distress. As part of that discussion Part IV considers a potentially crucial distinction—between a *secular paradigm of legitimacy* and a *paradigm of secular legitimacy*—that is usually overlooked in contemporary discussions. The conclusion briefly reflects on the prospects.

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6   *See* José Casanova, *The Secular, Secularizations, Secularisms, in* Rethinking Secularism, *supra* note 2, at 54, 62 ("It is obvious that when people around the world use the same category of religion, they actually mean very different things."). For an argument that "religion" does not denote a category that is useful in law, see Steven D. Smith, *Freedom of Religion or Freedom of the Church?, in* Legal Responses to Religious Practices in the United States (Austin Sarat ed., 2012).

7   *Cf.* Maclure & Taylor, *supra* note 5, at 17 (asserting that the secularist conception that they advocate, and that they perceive to enjoy a global consensus in liberal democratic societies, "has appeared only recently in history").

8   Rajeev Bhargava, *Rehabilitating Secularism, in* Rethinking Secularism, *supra* note 2, at 92, 93.

I. Paradigms of Legitimacy

Governments claim legitimacy. Not everyone will be persuaded by such claims, of course, or even by the proposed distinction between "legitimate" and "illegitimate" rule. Augustine recounted the story of a pirate captured by Alexander the Great. Asked by Alexander what he meant by marauding on the seas, the pirate answered, "What you mean by warring on the whole world. I do my fighting on a tiny ship, and they call me a pirate; you do yours with a large fleet, and they call you Commander."[9]

The story is provocative precisely because it challenges a distinction that is familiar, and a claim that governments make, probably of necessity. Governments claim that there *is* such a thing as "legitimacy," that they possess it, and that in this respect they are different from other wielders of power (such as pirates, or gangsters).

Legal theorists make a similar point with respect to *law*. Law claims "authority," which can be another name for, or alter ego, or at least close sibling of, legitimacy.[10] There is a crucial difference, H.L.A. Hart famously maintained, between the mugger who demands your wallet and the tax collector who demands your payment; unlike the mugger, as an agent of the (presumptively legitimate) government the tax collector claims authority and imposes, or purports to impose, obligation.[11] Once again, the distinction can be doubted: Holmes's celebrated "bad man," who recognizes no obligation and cares only about the consequences of compliance or non-compliance,[12] regards *law* in the way Augustine's pirate regarded *government*. But legal regimes assert that the bad man is missing a crucial distinction; they claim (of necessity, according to Joseph Raz[13]) that there is such a thing as authority and that their law has it, and that there is such a thing as obligation and that their law imposes it.

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9 Augustine, City of God, bk. IV, ch. 4 (Gerald G. Walsh, S.J., et al. trans., 1950).

10 The terms are often used as virtual synonyms. *See, e.g.*, Joseph Raz, Ethics in the Public Domain 211 (rev. ed. 1995) ("Authority in general can be divided into legitimate and *de facto* authority. The latter either claims to be legitimate or is believed to be so . . . .").

11 *See* H.L.A. Hart, The Concept of Law 79 (2d ed. 1994).

12 Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

13 *See* Raz, *supra* note 10, at 215 ("I will assume that necessarily law, every legal system which is in force anywhere, has *de facto* authority. That entails that the law either claims that it possesses legitimate authority or is held to possess it, or both.").

So governments claim authority for their law, and legitimacy for themselves. But how are these claims to be supported? From what does legitimacy derive?

Here there can be no universal answer. And the local answers are far from being purely philosophical in character. Legitimacy is surely tied to tradition, and to public display or (as Pascal put it) "masquerade,"[14] and also to effectiveness: a government that effectively provides order, security, and prosperity is more likely to be accepted as legitimate than one that cannot deliver these goods.[15] But legitimacy has an intellectual dimension as well. Governments and their supporters make claims or arguments calculated to demonstrate their legitimacy; and their effectiveness will depend in part on their success in gaining acceptance for these claims.[16]

Claims of legitimacy will naturally draw upon the beliefs that prevail in the society which a ruler or government seeks to govern; as these beliefs vary, the content of claims of legitimacy will vary as well. In a society in which most people believe that God closely and benevolently administers the world, claims of legitimacy are likely to appeal to religious premises.[17] Rulers may invoke some sort of divine commission, directly or indirectly conferred. In a thoroughly secular society, by contrast, those kinds of claims will be of no use; governments will have to appeal to other kinds of extant beliefs—to a belief that governments "deriv[e] their just Powers from the Consent of the Governed,"[18] for example. But whatever the character of the society, there will be some body of pertinent background beliefs in which claims of legitimacy will be grounded. Claims that manage to establish a solid connection to this set of background beliefs will have a

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14 BLAISE PASCAL, PENSEES 11 (Penguin Classics ed. 1966). Pascal explained:
Our magistrates have shown themselves well aware of this mystery. Their red robes, the ermine in which they swaddle themselves like furry cats, the law-courts where they sit in judgement, the fleurs de lys, all this august panoply was very necessary. If physicians did not have long gowns and mules, if learned doctors did not wear square caps and robes four times too large, they would never have deceived the world, which finds such an authentic display irresistible.

15 John Finnis's natural law theory explains governmental authority in terms of power to provide order and coordination. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 231–59 (2d ed. 2011). In this account, authority does not depend upon "[c]onsent, transmission, contract, [or] custom . . . ." *Id.* at 248.

16 For further discussion, see Steven D. Smith, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348, 357–62 (1995).

17 *See infra* Part III.

18 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

chance of succeeding; claims that cannot be plausibly connected to such prevalent beliefs will be vulnerable.

We can describe this body of pertinent background beliefs as a "paradigm of legitimacy."[19] The term immediately calls for qualifications. First, there is no suggestion here that every society has some coherent and canonical legitimating creed to which all members of the society subscribe. "Paradigm" must not be taken too stiffly; to describe the pertinent background beliefs as a "paradigm" is not to imply that those beliefs form a self-conscious, or unified, or coherent, or static philosophy. On the contrary, the background beliefs are likely to be diverse, and contested and evolving. Like Hart's "rule of recognition," they may be tacitly assumed and only faintly understood by those who rely on them; they may be extrapolated from practice as much as consciously articulated.[20] Just as terms like "feudalism" and "Enlightenment" are invented after the fact in an effort to capture the central commitments and practices of an earlier time (and even after their invention historians will debate how fully and accurately such terms describe the earlier period), so also a society's "paradigm of legitimacy" may be mostly presupposed, and contestable on both descriptive and normative levels. And yet in much the same way that the law moves to "work itself pure" through a process of ongoing reflection in response to contestation,[21] even so as a government's legitimacy is asserted, and questioned, and defended, the underlying structure of legitimating premises or beliefs—what I am calling the "paradigm of legitimacy"—is brought into the open, and polished up, and sometimes repaired or revised.

Or rejected. We come here to a second qualification. Paradigms of legitimacy can evolve or undergo refinement, but they can also be discarded and replaced. A paradigm describable as "*Romanitas*" is over time replaced by a more Christian paradigm, which in turn is

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19   The notion of a "paradigm" as a central explanatory concept is associated with Thomas Kuhn's work on the history of science. Thomas S. Kuhn, The Structure of Scientific Revolutions (3d ed. 1996); *see infra* notes 38–39 and accompanying text. In a later postscript, Kuhn acknowledged that he had used the term in different senses. What Kuhn called the "sociological" sense is close to what the term will mean here; "the term 'paradigm' . . . stands for the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community." Kuhn, *supra*, at 175. By a "paradigm of legitimacy," of course, we refer not to "the *entire* constellation of beliefs" shared by a community, but to that subset of such beliefs and values that bears on questions of political legitimacy.

20   *See* Hart, *supra* note 11, at 101 ("For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers.").

21   *See* Ronald Dworkin, Law's Empire 400–03 (1986).

displaced by a more secular and democratic one.[22] We will look at the nature and causes of such "paradigm shifts" in Part II.

Before turning to this topic, though, we should briefly note a third qualification. I have been using the term "paradigm of legitimacy" to refer to the *general* background beliefs held in a society that are pertinent to concerns of legitimacy and authority—to ideas such as the belief that all authority comes from God, or that governments must be based on the consent of the governed. But for any given society and government there are likely to be more local and particular legitimating beliefs and traditions as well.

Thus, in medieval and early modern Europe, disputes about the legitimacy of rulers often turned on the interpretation of dynastic customs and understandings about rules and lines of succession. When the king dies without a male heir, does power pass to the king's daughter or instead to a more distant male relative, or perhaps to the king's son by someone other than his wife? Or suppose the king's putative marriage to a first wife, and hence the legitimacy of the progeny of that union, are thrown into controversy, perhaps by doubts about whether the woman's prior union with the king's brother was actually consummated. What then? In contemporary America, similarly, the general notions of popular sovereignty and government by consent may be widely accepted as truisms, but the question whether a particular claimant is entitled to a particular political office can still turn on disputes about, say, how to count imperfectly marked ballots in a few counties of one particular state.[23]

A paradigm of legitimacy is typically too majestically abstract to be able to answer these kinds of nitpicky but potentially decisive questions of fact, procedure, and local tradition. So we might say that the paradigm furnishes supportive but not sufficient conditions of governmental legitimacy.

II. The Maintenance and Replacement of Paradigms

If all members of a society were of one mind with respect to the background beliefs that are pertinent to legitimacy, maintenance of a paradigm of legitimacy would be a simple task. In reality, that blessed (or suffocating) condition of unanimity is unlikely to obtain in any complex society. The background beliefs to which rulers appeal, or which they tacitly presuppose, will be accepted by some subjects but questioned or rejected by others; and interpretations of those beliefs

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22 *See infra* Part III.
23 *See* Bush v. Gore, 531 U.S. 98, 98 (2000) (holding that hand counting of only certain votes would be arbitrary).

may vary significantly. Consequently, governments adopt strategies for maintaining the paradigm and the beliefs that constitute it, and thus their own legitimacy, under conditions of disagreement.

Such strategies can fail. As noted, their failure can sometimes lead to a "paradigm shift" in which one paradigm of legitimacy is replaced by another.

A.   Maintenance Strategies

Maintaining a paradigm of legitimacy involves finding ways to deal with citizens or groups who do not share the beliefs that compose that paradigm. What to do about subjects of Rome—Jews and Christians—who are unwilling to join in the polytheistic pluralism, including emperor-worship, on which the empire is founded?[24] Or about non-Christians in a society in which Christianity supplies the background beliefs on which government and other vital institutions are based? How should a liberal democracy deal with dissenters—theocrats, communists, fascists, anarchists, monarchists—who do not accept that "We the People" created by and acting through some particular constitution are the fount of legitimate authority?[25]

The problem posed by dissenters is not limited to the immediate threat of disruption or disobedience by the dissenters themselves. The dissenters might be skeptical but docile. Or they might be dealt with, in some instances anyway, by sheer force: the dissenters might be compelled to conform, like it or not. But the perceived fact of dissent may also subvert the power of the paradigm, even for those who might otherwise incline to accept it. Suppose a government claims legitimacy on religious premises: some may wonder whether a government whose authority ostensibly comes from a supremely benevolent deity would employ brutality against the bodies and families of subjects who are sincerely unconvinced of the government's divine mandate. Or imagine a government purportedly based on the consent of the governed. Even if dissenters can be silenced or suppressed, the fact that they exist, and that they need to be suppressed, may raise doubts about whether the government can plausibly claim the requisite "consent."[26]

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24   *See infra* note 57 and accompanying text.

25   U.S. CONST. pmbl.

26   Such doubts might prompt the elaboration of theories of implied or constructive consent, or of alternative accounts of authority that can buttress the dominant or official theory. *See generally* LESLIE GREEN, THE AUTHORITY OF THE STATE 158–87 (1988) (discussing the "consent of the governed").

As a result, governments and societies more broadly adopt strategies securing support for the paradigms in which they are grounded. The various devices that governments employ for this purpose can be divided into *strategies of assimilation* and *strategies of marginalization.* Strategies of the first kind attempt to lure or drag people into acceptance of the prevailing paradigm. The second kind of strategy attempts to minimize the threat posed by dissenters by pushing them out of view, or beyond sympathetic consideration, so that their existence will not undermine general confidence in the paradigm.

Among the common strategies of assimilation, we may notice three: *conversion, annexation,* and *projection.* Conversion is the most straightforward strategy; erstwhile dissenters may be induced, perhaps by persuasion or perhaps by compulsion, to embrace the paradigm or the background beliefs in which that paradigm is situated. Here, of course, more politically-focused measures may join with the less politically-oriented efforts of people who are simply proponents of the background ideas that inform and support the paradigm of legitimacy. Thus, Christians sought to promulgate the Christian Gospel when they were a persecuted and despised minority. They were not promoting a "paradigm of legitimacy," but rather were spreading what they took to be the soul-saving truth. As Christianity became the dominant and legitimating philosophy of the Roman Empire and its successors, however, political leaders joined in these efforts to promote conversion, in part for political purposes.[27] Over time, as a result of these efforts, so-called pagans and barbarians were transformed into Christians, sometimes by missionaries and sometimes by militant monks, or soldiers. We will look at this development a bit more closely in Part III.

Or, if dissenters are reluctant to change their opinions, they can sometimes be brought into the fold by a different means: the prevailing paradigm may be extended so as to include or incorporate the beliefs and practices of the dissenters. Neighborhoods of dissent are thereby annexed, so to speak. In this way, as we will review in somewhat greater detail shortly, an emergent Christianity stretched to embrace as much as it could—some would say *more* than it could—of the surrounding pagan cultures.

Insofar as conversion and annexation are less than fully successful, proponents of the dominant paradigm can forecast more complete acceptance at some later date. They can claim that history—a history projected forward rather than backward—is on their side. Perhaps pagans, Jews, and others remain recalcitrant *now* in resisting the

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27 *See infra* notes 64–73 and accompanying text.

faith, but the time will come when "every knee should bend . . . and every tongue . . . confess that . . . Jesus is [Lord]."[28] Or, to cite a more recent instance, a sanguine Thomas Jefferson cheerfully predicts "there is not a young man now living who will not die an Unitarian."[29] Such prophecies may seem presumptuous or, sometimes, silly. But have not the visionaries of Enlightenment, democracy, secularism, human rights, and Marxism all indulged in similarly sanguine prognostications?

Of course, even the most optimistic and confident predictions do not do away with the inconvenient fact of present disagreement. To the extent that dissenters remain intransigent in resisting conversion and annexation, a society may attempt to minimize their threat to the prevailing paradigm by finding ways to marginalize them. Nonconforming minorities may be physically marginalized by being banished, or else relegated to special neighborhoods where they are less likely to mix with and thus contaminate the general body.[30] Or dissenters and deviants may be culturally marginalized by being assigned to categories—barbarians, pagans; heretics, schismatics; communists, socialists; reactionaries, fundamentalists, "unreasonable"[31]—that brand them as outliers. Their nonconforming beliefs and practices thus become less threatening to the prevailing "overlapping consensus" (to borrow a term) because it is understood or implied that they are not full or at least fully respectable and meritorious members of the community in any case.[32]

In a large and complex society, supporters of a paradigm of legitimacy will naturally resort to combinations of these strategies of assimilation and marginalization. So long as the strategies succeed, the paradigm will remain vigorous. But what if the strategies do *not* succeed?

B.   Paradigm Shifts

The term "paradigm" invokes associations with Thomas Kuhn's influential account of science and "scientific revolutions,"[33] and the association is intended. Kuhn discussed two kinds of scientific work. Most scientists practice "normal science"; basically, their task is to

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28   *Philippians* 2:10–11.

29   DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 88 (2006).

30   *See supra* notes 109–113 and accompanying text.

31   *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 50, 64, 243 n.42 (1996) (discussing culturally marginalized women who have had abortions).

32   *See infra* note 108 (discussing the marginalization of dissenters).

33   KUHN, *supra* note 19.

acquire and assimilate new information—new data, new observations, new experimental evidence—and to fit this new information into a prevailing scientific paradigm (such as the Newtonian conception of motion and gravity).[34] Normal science thus consists to a large extent of "puzzle solving" and "mopping up operations."[35] Through such efforts, the paradigm is reinforced—and, in the process, refined and adjusted—and the new information is domesticated and rendered intelligible in light of the paradigm.

Occasionally, though, a paradigm falters in addressing anomalies and puzzles, and if its failures persist the paradigm can enter a condition of "crisis."[36] Not every crisis is fatal; sometimes a paradigm may fall into crisis and yet recover.[37] But if the distress continues, the eventual result may be that the paradigm is discarded in favor of a new one that is more efficacious in accounting for all of the evidence (as well as more responsive to other less dryly rational concerns and interests[38]). Ptolemy's earth-anchored picture of the universe gives way to Copernicus's more economical and elegant sun-centered view; Newton's conceptions of time, space, and motion are displaced by Einstein's. These more sweeping and momentous changes, the result of "extraordinary science," constitute "paradigm shifts," or "scientific revolutions" akin to the political revolutions in which an *ancien regime* is replaced by a revolutionary one, or a tsarist administration is replaced by a Bolshevik government. Thus, Kuhn himself pointed out the analogy between the sorts of transformations he was discussing in the sciences and similar developments in politics and history.[39]

In a similar way, in the "normal" course of political and legal development, as paradigms of legitimacy are being maintained by strategies of assimilation and marginalization, they are constantly

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34 *Id.* at 23–42.

35 *Id.* at 35, 24.

36 *Id.* at 66–76.

37 *Id.* at 84 ("Sometimes normal science ultimately proves able to handle the crisis-provoking problems despite the despair of those who have seen it as the end of an existing paradigm.").

38 *See id.* at 156 (discussing importance of "subjective and aesthetic considerations" in paradigm selection).

39 *Id.* at 92–94 (discussing parallels between scientific and political revolutions). However, Brian Tamanaha points out to me—correctly, I think—that there are also important differences between scientific paradigms and paradigms of legitimacy. Scientific paradigms mainly serve explanatory and predictive purposes, for example; paradigms of legitimacy have a more normative function. In addition, scientific paradigms work and are used largely by an elite group of specialists; paradigms of legitimacy function in larger and more eclectic populations. E-mail from Brian Tamanaha (Aug. 24, 2011) (on file with author).

being refined, adjusted, and extended. But it can also happen that the strategies cease to be effective, and that a paradigm accordingly loses its plausibility and its ability to legitimate. In such circumstances, a "paradigm shift" can occur in which one body or family of legitimating beliefs is replaced by a fundamentally different one.

Such a shift is unlikely to be quick and clean. Like Supreme Court Justices, and like scientific paradigms, paradigms of legitimacy do not go gentle into that good night. Kuhn explained that in science, even as a paradigm becomes increasingly unwieldy and unsatisfactory, scientists will struggle to patch and preserve it.[40] However clumsy, however riddled with anomalies and embarrassments, a paradigm will persist until a better paradigm emerges to replace it[41]—how else could scientists continue to do their job, after all?[42]—and even then scientists brought up under the old paradigm will usually fight with tenacity and devotion to defend it.[43] Consequently, a paradigm shift typically takes place over a generation or more, as older scientists gradually die off and a new generation of scientists arises.[44] As we will see, shifts in paradigms of legitimacy exhibit similar features.

Here it will be helpful to borrow some terminology and insights (though not any overall theory or project) from a controversial but undeniably erudite student of recurring historical patterns—Arnold Toynbee.[45] Toynbee argued that past societies or civilizations have

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40   A paradigm's "defenders will do what we have already seen scientists doing when confronted by anomaly. They will devise numerous articulations and *ad hoc* modifications of their theory in order to eliminate any apparent conflict." *Id.* at 78. Indeed, "there are always some men who cling to one or another of the older views, and they are simply read out of profession, which thereafter ignores their work." *Id.* at 19.

41   *Id.* at 77.

42   *Cf. id.* at 79 ("To reject one paradigm without simultaneously substituting another is to reject science itself.").

43   "[S]ome scientists, particularly the older and more experienced ones, may resist indefinitely." *Id.* at 152.

44   *Id.* at 144–52; *see also id.* at 150–51:

   How, then, are scientists brought to make this transposition? Part of the answer is that they are very often not. Copernicanism made few converts for almost a century after Copernicus' death. Newton's work was not generally accepted, particularly on the Continent, for more than half a century after the *Principia* appears. Priestly never accepted the oxygen theory, nor Lord Kelvin the electromagnetic theory, and so on.

45   Toynbee's epic work A Study of History was originally published in ten hefty volumes over a period of years, beginning in 1933, with a subsequent volume called A Study of History: Reconsiderations (1961) [hereinafter Reconsiderations]. Although the work was generally admired for its ambition and erudition, its sweeping scope left it vulnerable to severe judgments from other scholars. Some of these are

typically followed a pattern that he divided (too rigidly, as critics pointed out[46]) into four main stages, which he called genesis, growth, breakdown, and disintegration. In the genesis and growth stages, "creative minorities"[47] form and lead the society in responding to environmental, political, or other types of challenges.[48] But if a challenge arises to which the society is unable to respond successfully, the society enters the phases of breakdown and eventually, unless it rights itself, disintegration.

In these periods of decline, the society experiences fragmentation, or "schism in the body social" and "schism in the soul."[49] The "creative minority," having lost its capacity to elicit the freely-conferred respect of others in the society, becomes a "dominant minority" that rules by position and force rather than by charisma or genuine authority.[50] Other members of the society, now increasingly disaffected, become what Toynbee called an "internal proletariat."[51] "The

collected in TOYNBEE AND HISTORY (M. F. Ashley Montagu ed., 1956). *See, e.g.*, Hugh Trevor-Roper, *Testing the Toynbee System, in* TOYNBEE AND HISTORY, *supra*, at 122 ("He compares himself with the Prophet Ezekiel; and certainly, at times, he is just as unintelligible."); *id.* at 124 (charging Toynbee with "intellectual hanky-panky" and "a terrible perversion of history"). A more pedestrian criticism asserted that the work was "too voluminous and could have been compressed without losing anything in the clearness and completeness of its theory." Pitirim A. Sorokin, *Toynbee's Philosophy of History, in* TOYNBEE AND HISTORY, *supra*, at 172, 178; *see also* Hans J. Morgenthau, *Toynbee and the Historical Imagination, in* TOYNBEE AND HISTORY, *supra*, at 191, 191 (noting both admirers and critics "have looked at Mr. Toynbee's work as a kind of monstrosity whose bigness either overwhelms or irritates them"). However, Toynbee himself also commended a (still substantial) two-volume abridgement by D. C. Somervell, first published in 1946. See 1 ARNOLD J. TOYNBEE, A STUDY OF HISTORY vii (D.C. Somervell abr. 1946) [hereinafter A STUDY OF HISTORY]. The abridgement is more readily available today, and given that I will be referring only to Toynbee's general framework and some of his concepts and terms, my citations will be to the Somervell abridgement, and to the later volume of RECONSIDERATIONS.

46   *See* Ernest Barker, *Dr. Toynbee's Study of History: A Review, in* TOYNBEE AND HISTORY, *supra* note 45, at 89, 95 ("History . . . is infinitely multiform. As I see the matter, Dr. Toynbee *imposes* patterns on history, which I, for one, am far from accepting . . . ."); *see also* Sorokin, *supra* note 45, at 172, 182 (objecting that the "conceptual scheme of 'genesis-growth-decline,' . . . is possibly the worst of all existing schemes of change of civilizations").

47   "By a creative minority I mean a ruling minority in which the creative faculty in human nature finds opportunities for expressing itself in effective action for the benefit of all participants in the society." RECONSIDERATIONS, *supra* note 45, at 305.

48   A STUDY OF HISTORY, *supra* note 45, at 48–243.

49   *Id.* at 371, 429.

50   *Id.* at 371–75.

51   *Id.* at 375–403; *see also id.* at 246:

   [W]hen, in the history of any society, a creative minority degenerates into a
   dominant minority which attempts to retain by force a position that it has

true hall-mark of the proletarian," he explained, "is neither poverty nor humble birth but a consciousness—and the resentment that this consciousness inspires—of being disinherited from his ancestral place in society."[52] Eventually a new "creative minority" may arise to address the current challenges, and a new society emerges.[53]

Whether or not Toynbee accurately described the course of civilizations, and without supposing any deterministic course of history (something that, contrary to critics' accusations, Toynbee himself denied[54]), the conditions he described can be applied to paradigms of legitimacy. When a paradigm's proponents (analogous to Toynbee's "creative minority") are effective in maintaining it, they creatively deploy the various strategies of assimilation and marginalization to uphold the legitimacy of the paradigm, and of the government founded on that paradigm. Conversely, as we will see, when these strategies fail in their task of including and excluding, the paradigm can come to seem imposed and oppressive, the government and its laws begin to lose their authority and to become merely coercive and "dominant," and many of the government's subjects withdraw their willing engagement and support. The result can be breakdown or disintegration and, possibly, eventually, the emergence of a new paradigm of legitimacy.

Our discussion thus far has been mostly in general terms. It may be helpful to consider, in overview at least, how these strategies and processes have worked in leading to the political and legal world we currently inhabit.

III.   Setting the Stage for Secularism: the Rise and Decline of the Christian Paradigm

Two millennia ago, the political ancestor of our current governmental institutions was the Roman Empire, which emerged in the first

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ceased to merit, this change in the character of the ruling element provokes, on the other side, the secession of a proletariat which no longer admires and imitates its rulers and revolts against its servitude.

52   *Id.* at 377. Toynbee made clear that he was not following "the celebrated Marxist modern usage" of the term, but instead intended to include "all 'displaced persons.'" Reconsiderations, *supra* note 45, at 306–07.

53   A Study of History, *supra* note 45, at 244–46. Toynbee argued that the disintegration of the old society or civilization was often accompanied by what he called a "Time of Troubles" followed by a "heroic age" of violent disruption or incursions by an "external proletariat"—the "barbarian" invaders of Rome were a classical example—of persons outside the geographical borders of the society who, perceiving its weakness, mount assaults on the society. *Id.,* at 403–20.

54   *See infra* notes 230–31 and accompanying text.

century BCE when the Roman Republic collapsed under the weight of internecine strife. The political culture of the empire is sometimes described as *Romanitas*—a constructive blend of traditional Roman commitments to law and civic virtue, grounded in and supported by a flexible polytheism including, importantly, the cult of deified emperors, and supplemented to some extent by Hellenistic philosophies such as Stoicism and neo-Platonism.[55] The Roman culture's capacious receptivity to a variety of deities and religions gave it flexibility and an impressive power to assimilate and incorporate conquered peoples.[56]

But not everyone was assimilable. In particular, the adherents of monotheistic faiths—Jews and Christians—were unwilling to accept the empire's sprawling polytheism, or to sacrifice to supposedly divine emperors.[57] Hence, although Judaism was officially accepted under the Roman regime, misunderstandings and conflicts were frequent. The Romans subjected Jews to a special tax, and they brutally crushed Jewish uprisings that began in CE 66, 117, and 135.[58] Eventually, the emperor Hadrian banned circumcision throughout the empire and re-founded Jerusalem as a Roman city, called Aelia Capitolina, which was dedicated to the worship of Jupiter, Bacchus, Sarapis and other pagan deities, and from which Jews were excluded.[59] Christians, though often tolerated within the empire, were officially outlawed beginning in the reign of Nero,[60] and they were subjected to sporadic

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55   For a good account of how religion infused political practice and authority in the Roman Empire, see PAUL STEPHENSON, CONSTANTINE 13–37 (2009). For a learned overview and analysis of the various elements of *Romanitas*, see CHARLES NORRIS COCHRANE, CHRISTIANITY AND CLASSICAL CULTURE (1940). On the deification of emperors, see HANS-JOSEF KLAUCK, THE RELIGIOUS CONTEXT OF EARLY CHRISTIANITY 250–330 (Brian McNeil trans., 2000).

56   Charles Freeman explains that

> [l]ocal gods would be merged into the Roman pantheon—a provincial god of thunder could simply be seen as Zeus or Jupiter in a different guise—with the result that a complex of interlocking rituals and sacred sites could sustain local cultures without undermining Roman supremacy. Over one or two generations of Roman rule, provincial elites, ancient or newly created, would come to recognise that it was in their interests to cooperate in the long-term survival of the empire.

CHARLES FREEMAN, A.D. 381: HERETICS, PAGANS, AND THE DAWN OF THE MONOTHEISTIC STATE 18 (2008).

57   *See* ROBERT A. MARKUS, CHRISTIANITY AND THE SECULAR 20–21 (2006).

58   *See generally* MARTIN GOODMAN, ROME AND JERUSALEM (2007) (chronicling the conflict between the Roman and Jewish worlds).

59   *Id.* at 460–64.

60   Henry Chadwick, *The Early Christian Community*, *in* THE OXFORD HISTORY OF CHRISTIANITY 41–46 (John McManners ed., 1990).

but savage persecutions.[61] These minorities were, in Toynbee's terms, "internal proletariats."

As authority and order in the Empire began to break down in the third century, the emperors Decian and Valerian instituted ferocious and thoroughgoing persecutions and purges of anyone who would not sacrifice to the gods before special commissioners.[62] The emperor Diocletian renewed the purge of Christians in the early fourth century. Robert Markus observes that "[i]n the Great Persecution at the beginning of the fourth century, the forces of Roman conservatism rallied in a last attempt to eliminate a dangerous threat to the traditional consensus."[63]

These strategies failed to achieve unity and stability in the empire. Consequently, over the next century or so, the empire underwent a transformation from paganism and traditional *Romanitas* to Christianity and Christendom. Exactly how this change occurred and when it was effectively consummated present questions to which historians have given very different answers. One common interpretation maintains that by the third and fourth centuries CE (sometimes described as an "Age of Anxiety,"[64] or a period of "senescence"[65]), paganism had ceased to satisfy people's spiritual and intellectual needs. Romans increasingly turned to Eastern "mystery cults" such as Mithraism and, eventually, to Christianity because these faiths offered a more adequate and satisfying approach to life and death. In this vein, the Belgian scholar Franz Cumont argued that by late antiquity, "[t]he old national religion of Rome was dead,"[66] the Swiss historian

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61   Before the mid-third century, persecutions of Christians were usually local and temporary but also draconian:

> Public executions for any crime were made especially unpleasant since they were supposed to act as a deterrent. They were also often included in public entertainments. Not all Christians were killed. Men might be sent to labour in the appalling conditions of imperial mines, while women were sometimes sent to work in brothels. On other occasions fines or imprisonment were used, again in the hope of persuading the accused to recant. When the death sentence was imposed, it was often inflicted in extremely savage ways, even by Roman standards. Usually the crowd revelled in the slaughter . . . .

Adrian Goldsworthy, How Rome Fell 98 (2009).

62   Henry Chadwick, The Early Church 118 (rev. ed. 1993).

63   Markus, *supra* note 57, at 21.

64   *See generally* E.R. Dodds, Pagan and Christian in an Age of Anxiety (1965) (relating the shared experiences of pagans and Christians in the period between Marcus Aurelius and Constantine).

65   Jacob Burckhardt, The Age of Constantine the Great 215 (Moses Hadas trans., 1949).

66   Franz Cumont, The Oriental Religion in Roman Paganism 104 (Filiquarian reprint, first published 1906).

Jacob Burckhardt asserted that "paganism [was] in full process of dis-solution . . . mortally weakened by internal disintegration and willful intermixture from without,"[67] and the Oxford historian E. R. Dodds contended that "[i]n the fourth century paganism appears as a kind of living corpse."[68] Christianity came to prevail, Dodds thought, because it offered greater certainty and meaning, because it "was open to all . . . [,] accept[ing] the manual worker, the slave, the outcast," and because it was "a religion of lively hope, [holding] out to the disinher-ited the conditional promise of a better inheritance in another world."[69] Burckhardt explained that

> the great mass felt attracted by the forgiveness of sins which was made prominent, by the immortality of the soul which was prom-ised, and by the mystery which surrounded the sacraments and which for many was surely only a parallel to the pagan mysteries. The slave was attracted by Christian freedom and brotherly love, and many an unworthy convert by the very considerable alms which were bestowed with true impartiality . . . .[70]

On this view, the emperor Constantine's embrace of Christianity is sometimes interpreted as a political move to place the empire on a more secure foundation. Constantine is sometimes viewed as a "cyni-cal opportunist."[71] For Jacob Burckhardt, Constantine was "essentially unreligious" but was "driven without surcease by ambition and lust for power."[72] The emperor decided to support Christianity

> [w]hen he became convinced by the significant growth of the [Christian] community, by the clearly developed character of its hierarchy, by the peculiar form of its synodic organization, and by

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67 BURCKHARDT, *supra* note 65, at 127–28; *cf.* PAUL VEYNE, WHEN OUR WORLD BECAME CHRISTIAN 136 (Janet Lloyd trans., 2010) (observing that "paganism, lacking both dogma and orthodoxy, had disintegrated into a confused crowd of deities and cults that hardly merited the name of religion.").

68 DODDS, *supra* note 64, at 132.

69 *Id.* at 134–35.

70 BURCKHARDT, *supra* note 65, at 125. For a subtler variation on this theme, albeit with a focus more on the comparative abilities of paganism, Eastern cults, and Christianity to support a sense of community, see PETER BROWN, THE WORLD OF LATE ANTIQUITY 49–81 (1971). In a similar vein, see generally RODNEY STARK, CITIES OF GOD (2006) (detailing Christianity's rise over paganism as an urban movement in the Roman Empire). The eminent French historian Paul Veyne, speaking as "an unbe-liever," VEYNE, *supra* note 67, at 24, argues for the "manifest superiority [of Christian-ity] over paganism." *Id.* at 17. Nonetheless, Veyne attributes the eventual triumph of Christianity not to this superiority but rather to the exertions of Constantine and his successors. *Id.* at 121.

71 ADRIAN MURDOCH, THE LAST PAGAN 5 (2003).

72 BURCKHARDT, *supra* note 65, at 292.

the entire character of contemporary Christianity that a support for the throne might be contrived out of this enormous power.[73]

A very different interpretation holds that on the eve of Constantine's conversion to Christianity, far from being exhausted, paganism was flourishing while Christianity remained weak. Christianity eventually triumphed not because it better met spiritual or intellectual needs—on the contrary, at least as depicted by a scholar such as Ramsay MacMullen, pagan religion was generally superior in this respect—but rather because of the forcible suppression of paganism by Constantine and his successors.[74] Paganism succumbed, gradually, to "the murderous intolerance of the now dominant religion."[75] In this interpretation, Constantine found no political advantage in supporting Christianity; rather, the emperor-to-be was a sincere and zealous convert.[76] In a variation on this view, H. A. Drake contends that imperial policy under Constantine was broadly tolerant and inclusive. However, the effort of the emperor Julian in the mid-fourth century to restore paganism by legally marginalizing Christianity[77] revived Christian memories and fears of the persecutions under Diocletian earlier in the century, thereby provoking a repressive backlash following Julian's death.[78]

Whatever the causal currents, by the end of the fourth century emperors had become committed to a new strategy and a new paradigm. Rather than attempting to eliminate Christianity as a subversive threat to *Romanitas*, they came to embrace and promote Christianity as a more promising basis for authority and order. Peter Heather explains:

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73   *Id.* at 279.

74   Ramsay MacMullen, Christianity and Paganism in the Fourth to Eighth Centuries 1–32 (1997); *see also* Freeman, *supra* note 56. *See generally* Burckhardt, *supra* note 65, at 279 (detailing the eventual support of Christianity by Constantine).

75   MacMullen, *supra* note 74, at 14.

76   For an overview of the debate and an argument that Constantine *was* genuinely Christian, see Peter J. Leithart, Defending Constantine 79–96 (2010). *See also* Diarmaid MacCulloch, Christianity 191 (2010) ("There is no doubt that he came to a deeply personal if rather capricious involvement in the Christian faith . . . ."); *cf.* Veyne, *supra* note 67, at 121 ("All in all, the Christianization of the ancient world constituted a revolution set in motion by a single individual, Constantine, with motives that were exclusively religious.").

77   *See* Robert Louis Wilken, The Christians as the Romans Saw Them 165–66 (2d ed. 2003) ("Julian . . . initiated a frontal attack on the Christian movement, using the law to restrict Christian influence and the power and prestige of his office to promote the practice of the traditional pagan rites.").

78   *See* H.A. Drake, Constantine and the Bishops 437 (2000).

> Roman imperialism had claimed, since the time of Augustus, that the presiding divinities had destined Rome to conquer and civilize the world. The gods had supported the Empire in a mission to bring the whole of humankind to the best achievable state, and had intervened directly to choose and inspire Roman emperors. After Constantine's public adoption of Christianity, the long-standing claims about the relation of the state to the deity were quickly, and surprisingly easily, reworked . . . . The claim that the Empire was God's vehicle, enacting His will in the world, changed little: only the nomenclature was different. Likewise, while emperors could no longer be deified, their divine status was retained in Christian-Roman propaganda's portrayal of God as hand-picking individual emperors to rule with Him, and partly in His place, over the human sphere of His cosmos.[79]

This transformation was resisted by the emperor Julian,[80] for example, and the patrician Symmachus.[81] Paganism lingered on both in the countryside and in enclaves like Athens for decades, even centuries.[82] But by the end of the fourth century, paganism was a depleted and marginal element in the Roman world.

Thus occurred a paradigm shift, from *Romanitas* to Christianity. Just when the shift was complete is of course a question on which views differ. The change is variously dated to Constantine's conversion,[83] to the death of Julian "the Apostate" in 363,[84] to the emperor

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79   PETER HEATHER, THE FALL OF THE ROMAN EMPIRE 123 (2006).

80   *See generally* MURDOCH, *supra* note 71, at 135–36 (noting Julian's opposition to the Christianity movement in the Roman empire); CHADWICK, *supra* note 62, at 155.

81   *See* CHADWICK, *supra* note 62, at 167.

82   *See* PETER BROWN, POWER AND PERSUASION IN LATE ANTIQUITY 129 (1992) ("[P]olytheists firmly established in small cities all over the eastern empire . . . up to and beyond the end of the sixth century."); *see also* BROWN, *supra* note 70, at 73 ("And even a century and a half after the battle for the public faith of the empire was lost to Christianity, the philosopher Proclus would be writing, in the mood of a still evening after thunder, intimate hymns to the gods and a totally pagan ELEMENTS OF THEOLOGY."). Note, however:

> In rural districts the country folk were deeply attached to old pagan customs, especially those associated with birth, marriage, and death. In the Western provinces the pastoral problem for centuries was to stamp out pagan superstitions among the peasants on the land. But in the towns, even in such Christian citadels as Syria and Asia Minor, clandestine rites, including occasional sacrifices, continued to be practiced as late as the seventh century.

CHADWICK, *supra* note 62, at 168–69.

83   *Cf.* AVERIL CAMERON, CHRISTIANITY AND THE RHETORIC OF EMPIRE 4 (1991) ("Some modern books give the impression that the conversion of Constantine brought about an immediate transformation of society, but the truth was far otherwise.").

84   *See* MURDOCH, *supra* note 71, at 6.

Theodosius's proscription of pagan worship in 391 and 392,[85] to Theodosius's defeat of the pagan forces of Arbogast in 394,[86] or to the gradual suppression and marginalization of paganism over the fifth and sixth centuries.[87]   The reality is that the shift from classical *Romanitas* to Christianity was a process that took centuries to unfold, and historians will no doubt continue to debate when (if ever) the transformation was consummated.   Because Christianity did not so much repudiate classical themes, categories, and practices as adopt, incorporate, and rework many of them[88]—baptize or Christianize them, we might say—it is very hard to judge when the old had been successfully replaced by the new.   By one view, in fact, Western Europe did not become truly Christianized until after the Protestant Reformation[89] (by which time the breakup of Christendom was already underway).[90]

Peter Brown expresses a more standard view.   Brown argues that Christian rhetoric and culture of the fourth century was not distinctively Christian, and exhibited an easy blending and acceptance of

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85   *See* FREEMAN, *supra* note 56, at 119–22 (discussing Theodosius's anti-pagan laws).   Rodney Stark argues, though, that these proscriptions were deliberately underenforced, see STARK, *supra* note 70, at 196–99, and he points out that "Theodosius, the emperor who, according to Gibbon, extirpated paganism, appointed nearly as many men who were openly pagans as he did Christians to the positions of consuls and prefects."   *Id.*, at 200.

86   *See* VEYNE, *supra* note 67, at 104 ("But what put an end to paganism was not so much that ban of 392, but the imminent defeat of the pagan party in battle, soon after, in 394.").

87   *See generally* BROWN, *supra* note 70, at 96–136 (chronicling the expansion of Christianity from years 300–600); MACMULLEN, *supra* note 74, at 1–32 (describing the efforts of Christian leadership to suppress pagan acts and practices in eliminating all other religious alternatives).

88   *See infra notes* 106–08 and accompanying text.   This incorporation of elements of the former paradigm is typical of new paradigms.   However:

> Since new paradigms are born from old ones, they ordinarily incorporate much of the vocabulary and apparatus, both conceptual and manipulative, that the traditional paradigm had previously employed.   But they seldom employ these borrowed elements in quite the traditional way.

KUHN, *supra* note 19, at 149.

89   *See also* MACMULLEN, *supra* note 74, at 152 ("I make no attempt to determine when . . . paganism had disappeared for good . . . . [I]n fact the event in some sense, I would say, never ended, at least not if the disappearance of paganism is what's in question.").   *See generally* KEITH THOMAS, RELIGION AND THE DECLINE OF MAGIC 51–78 (1971) (discussing how the Protestant Reformation attempted to take the magic out of religion in sixteenth and seventeenth century England).

90   Peter Gay's notable history interprets the European Enlightenment as a kind of return to paganism. PETER GAY, THE ENLIGHTENMENT (1966).

classical ingredients. Over the next century or so, however, this condition changed.[91] Christians developed "a new model of power."[92]

The promotion of the Christian paradigm by late Roman emperors and their successors and supporters involved all of the strategies of assimilation and marginalization outlined in the previous Section. The project of converting erstwhile pagans and barbarians operated on various levels and through various means. Massive international councils of bishops and theologians were convened and supervised by emperors, with the goal of formulating Christian doctrines into universally acceptable (and enforceable) creeds.[93] Christian bishops and thinkers—and artisans, architects, artists, musicians, and others— undertook to present these doctrines through a variety of media and on both crudely popular and intellectually sophisticated levels.[94] The teachings were promulgated to erstwhile pagans and barbarians by an army of dedicated missionaries like Columbanus, Boniface, and Ulfilas.[95] Monks and ascetics, such as the dramatic "Stylites" who lived atop pillars for years or even decades, provided inspirational or at least impressive models of faithful devotion.[96]

Much of the persuasion was indirect. As emperors came to favor Christianity, acceptance of the new religion became conducive to career advancement. Bishops became major centers and sources of

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91   *See* PETER BROWN, AUTHORITY AND THE SACRED 11–15 (1995).

92   *Id.* at 19.

93   *See* PHILLIP JENKINS, JESUS WARS 21–25 (2010); *see also* NORMAN F. CANTOR, THE CIVILIZATION OF THE MIDDLE AGES 49 (rev. ed. 1993) ("Early in his imperial career Constantine sensed that the church could act as backbone for the empire. Hence he made desperate attempts to preserve the unity of the church . . . .").

94   *Cf.* CAMERON, *supra* note 83, at 8. Cameron wrote:

It is true of Christianity (and one of its major strengths) that it was inclusive in a way in which pagan culture always remained elitist; the most sensitive Christian thinkers were acutely aware of this advantage and paid a great deal of attention to its exploitation by the effective presentation of the faith at all intellectual and society levels, and by the widest possible means. But that is quite different from suggesting, as is often done, that the general adoption of Christianity implied the defeat of the intellect and the triumph of popular religion. Any halfway adequate explanation of the phenomenon must do as much justice to the appeal of Christianity to the most highly educated, and to its most sophisticated theological formulations, as to any supposedly popular piety or superstition.

Id.

95   *See generally* Henry Mayr-Harting, *The West: The Age of Conversion (700-1050), in* THE OXFORD HISTORY OF CHRISTIANITY, *supra* note 60, at 92 (characterizing the Christian movement as being driven not by great individuals, but instead by "missionary drive").

96   *See* MACCULLOCH, *supra* note 76, at 200–10.

influence and assistance to the poor.[97] Impressive new Christian churches commanded the avenues and skylines of major cities, thereby Christianizing the urban ethos.[98]

When persuasion failed to convert, force was often applied.[99] Mobs and troops of militant monks, instigated sometimes by bishops, sacked pagan temples or shrines and assaulted and sometimes killed prominent pagans (like the noted scholar Hypatia of Alexandria).[100] Later, when Charlemagne conquered the Saxons they were compelled to become Christians;[101] the same was required of the invading Danes when they were defeated by the English king Alfred.[102] Centuries later still, after Christians re-conquered the Iberian Peninsula, Muslims and Jews were permitted to remain in Spain only if they could persuade suspicious authorities that they had converted to Christianity.[103] In these ways, former outsiders were recruited, willingly or reluctantly, into the Christian paradigm.

Christian leaders also made use of the devices of annexing or incorporating erstwhile pagan practices and beliefs into the Christian system (and critics might object that this statement reverses the direction of incorporation).[104] Keith Thomas recalls:

> [T]he notorious readiness of the early Christian leaders to assimilate elements of the old paganism into their own religious prac-

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97   *See* Brown, *supra* note 82 at 89–103, 119.

98   *Id.* at 120–21.

99   For a discussion of the use of force to suppress paganism and establish Christianity, see generally Freeman, *supra* note 56, and MacMullen, *supra* note 74.

100   *See* Brown, *supra* note 82, at 108, 113–16. To be fair, in those tumultuous times, the rampaging often ran both ways, and it was not always perfectly clear "who started it." *See* David Bentley Hart, Atheist Delusions 3–44, 120 (2009).

101   Hywell Williams, Emperor of the West 77–82 (paperback ed. 2011); *see also* Roger Collins, Early Medieval Europe 300–1000, at 281–86 (3d ed. 2010) (describing Charlemagne's subjugation of the Saxons).

102   *See* Collins, *supra* note 101, at 362.

103   MacCulloch, *supra* note 76, at 585–90.

104   *See* Robert Markus, *From Rome to the Barbarian Kingdoms*, *in* The Oxford Illustrated History of Christianity, *supra* note 60, at 66–67. Markus wrote:

> By the middle of the fourth century, Christianity had gone a long way towards assimilating the dominant culture of pagan Romans. An easy symbiosis had come into being between the cultivated pagan and the educated Christian. . . . Right across the social scale, religion made little perceptible difference to the outward shape of life. Many Christians continued to take part in traditional Roman festivities; they sometimes shocked their bishops by dancing in church, getting drunk at celebrations in the cemeteries, consulting magicians, or resorting to charms to cure their troubles, just as did other people.

Id.

tice . . . . The ancient worship of wells, trees[,] and stones was not so much abolished as modified, by turning pagan sites into Christian ones and associating them with a saint rather than a heathen divinity. The pagan festivals were similarly incorporated into the Church year. New Year's Day became the feast of the Circumcision; May Day was SS. Philip and James; Midsummer Eve the Nativity of St John the Baptist. Fertility rites were converted into Christian processions and the Yule Log was introduced into celebrations of the birth of Christ.[105]

When Pope Gregory the Great sent missionaries to proselytize Anglo-Saxon England, he explicitly instructed them to retain and incorporate as much of the Anglo-Saxon religion as possible.[106]

Projection also figured in the Christian expansion. The Christian religion was destined ultimately to prevail, Christians believed, because the earthly struggle was in a sense a consolidation of a struggle that had already been fought in heaven, and won. Thus, their ultimate triumph was historically guaranteed.[107]

Despite these confident predictions, and these efforts at conversion and annexation, some remained recalcitrant. Such dissenters were marginalized[108] or excluded (or sometimes eliminated). Marginalization of outsiders became particularly severe when, begin-

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105   THOMAS, *supra* note 89, at 47–48.
106   *See* PETER HUNTER BLAIR, THE WORLD OF BEDE 63 (1970). According to Blair:
The [pagan] temples were by no means to be destroyed, but only the images which they housed. If the temples were well built they were to be consecrated to the service of God so that the people might continue to worship in familiar places. They should not be deprived of their customary sacrifices of oxen, but on appropriate days they should build wooden booths in the neighbourhood of former temples, now converted to Christian use, and celebrate with religious feasting, their animals no longer sacrificed to devils, but killed for their own food with thanksgiving to God.

Id.
107   Peter Brown explains that:
the conflict between Christianity and paganism was presented, in fourth- and fifth-century Christian sources, as having been fought out in heaven rather than on earth. The end of paganism occurred with the coming of Christ to earth. It was when He was raised on the Cross on Calvary—and not, as we more pedestrian historians tend to suppose, in the reign of Theodosius I— that heaven and earth rang with the crash of falling temples. The alliance of the Christian church with Christian emperors, to abolish sacrifice and to close and destroy the temples, was not more than a last, brisk mopping-up operation, that made manifest on earth a victory already won, centuries before, by Christ, over the shadowy empire of the demons.

BROWN, *supra* note 91, at 4–5.
108   On the marginal status of pagan thinkers in a largely Christianized empire, see BROWN, *supra* note 82, at 145 ("It would only be in the intimate, domestic friendship

ning in the twelfth century, Jews were often clustered in ghettos, required to wear a yellow identifying label, expelled from England and France (and later from Spain and Portugal),[109] and subjected to periodic pogroms.[110] Ostensibly or formerly Christian persons of nonconforming or subversive opinions or habits could be classified as heretics or schismatics, or witches, and could be subjected to the discipline of the Inquisition or other forms of prosecution or exclusion.[111] Large communities of heretical dissenters, such as the Albigensians, might find themselves the target of a domestic Crusade.[112]

Through these methods, some peaceful and some militant or brutal, leaders and rulers were able to maintain Christianity as the basic background belief and source of legitimacy for centuries. That statement of course does not convey the enormous complexities, contestations, and convulsions that occurred within Christendom over this period. There were epic debates about what Christian teaching actually was, or should be,[113] and about the political implications of that teaching. Christian ideas, originally expressed through the adoption and conversion of classical categories and terms, were continually reshaped by new influxes from classical or outside sources,[114] such as the reception of Aristotle in the thirteenth century. And yet the fact is that for centuries, not only popes but also kings argued about and justified political authority largely on Christian premises.[115]

The paradigm of legitimacy, in short, was distinctively Christian. It was maintained by the familiar strategies of assimilation and marginalization. And then . . . those strategies began to lose their

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of the circle of their colleagues, students, and wives and in their dreams—when the gods visited them with gentle familiarity—that the last philosophers felt at ease.”).

109   *See generally* B. NETANYAHU, THE ORIGINS OF THE INQUISITION IN FIFTEENTH CENTURY SPAIN (2d ed. 1995) (discussing, as the title suggests, the causes of the Spanish Inquisition).

110   CANTOR, *supra* note 93, at 366–67.

111   *See* MACCULLOCH, *supra* note 76, at 396–401, 686–87.

112   *See id.* at 387–88.

113   *See generally* JENKINS, *supra* note 93 (describing the often violent struggle in the early centuries of the Church to define the fundamental teachings of Christianity).

114   *Cf.* LOUIS DUPRÉ, RELIGION AND THE RISE OF MODERN CULTURE 6 (2005) (“[T]he classical culture . . . had never ceased to influence the medieval one . . . .”).

115   *See* WILLIAM CHESTER JORDAN, EUROPE IN THE HIGH MIDDLE AGES 85–87 (2001); WALTER ULLMANN, PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES 57–114 (1961). *See generally* BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE 1050–1300 (1964) (discussing the struggle for power between secular and Christian rulers and how each legitimized their authority in the eleventh through fourteenth centuries).

force, and the Christian paradigm came to relinquish its hold. And a new paradigm of legitimacy emerged to replace it.

IV. THE RISE AND DECLINE OF THE SECULAR PARADIGM

And what was that new paradigm? For present purposes, and subject to a variety of qualifications and questions, we can call it the "secular paradigm."

To be sure, that description notices only part of the body of beliefs that emerged with respect to questions of governmental legitimacy. Another crucial part of the more modern paradigm has been that government should be based on the consent of the governed, and should represent them and act in their interests. So it would perhaps be more accurate to describe the views that emerged with the breakdown of Christendom as constituting a "democratic paradigm." For present purposes, though, the essential feature of the newer paradigm, and the feature that distinguished it most directly from the more top-down and theistic paradigm of medieval Christendom, was its assumption that legitimate government is "secular" in character.[116]

A. The Ascendency of the Secular Paradigm

It may be best to start with the present, and with a general statement. Charles Taylor begins a major, much discussed study of *A Secular Age* by observing that:

> [W]hereas the political organization of all pre-modern societies was in some way connected to, based on, guaranteed by some faith in, or adherence to God, or some notion of ultimate reality, the modern Western state is free from this connection. Churches are now separate from political structures (with a couple of exceptions, in Britain and the Scandinavian countries, which are so low-key and undemanding as not really to constitute exceptions). Religion or its absence is largely a private matter. The political society is seen as that of believers (of all stripes) and non-believers alike.[117]

Taylor's description provokes central questions, some of which we may notice but thankfully need not answer. There are the usual questions about *how* and *when*. How did the Christian worldview come to be displaced by a secular one, at least in some cultural domains? Different historians and theorists emphasize different influences: nominalistic philosophical and voluntaristic theological devel-

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116   In fact, medieval thinkers also believed that government is "secular," but they understood the term in very different ways. For a discussion, see STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE 112–50 (2010).

117   CHARLES TAYLOR, A SECULAR AGE 1 (2007).

opments of the late Middle Ages and early modern period,[118] the Protestant Reformation and the political reaction to the ensuing wars of religion,[119] the achievements of science,[120] and the organized efforts of thinkers and movements of the nineteenth and twentieth centuries.[121] Taylor's own book is an extended reflection on how contemporary secularism came to be.

And at what point did the secular paradigm become dominant? With the Peace of Westphalia, in 1648?[122] But that accord, although it may have brought the era of the "Wars of Religion" and the ideal of an overarching Christendom to an end,[123] also ushered in the era of the confessional state.[124] So then maybe the secular paradigm triumphed with the adoption of the American Constitution? The Constitution *was* a deliberately secular document, as proponents of secular government insistently point out,[125] but did it require that governments must be secular? If it did, this ostensibly central feature seems somehow to have been missed by founding era citizens and political leaders; they appointed official chaplains and designated

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118   For an illuminating study of such developments, see generally LOUIS DUPRÉ, PASSAGE TO MODERNITY (1993).

119   *See* Charles Taylor, *Modes of Secularism, in* SECULARISM AND ITS CRITICS 31, 32 (Rajeev Bhargava ed., 1998) ("The origin point of modern Western secularism was the wars of religion; or rather, the search in battle-fatigue and horror for a way out of them."); *see also* WOLFHART PANNENBERG, CHRISTIANITY IN A SECULARIZED WORLD 11–14, 18 (1989) (discussing the rise of secularism as a reaction to wars of religion).

120   *See* OWEN CHADWICK, THE SECULARIZATION OF THE EUROPEAN MIND IN THE NINE-TEENTH CENTURY 161–88 (1990); MARK LILLA, THE STILLBORN GOD 58–65 (2007).

121   *See, e.g.*, Christian Smith, *Introduction: Rethinking the Secularization of American Public Life, in* THE SECULAR REVOLUTION 1, 1 (Christian Smith ed., 2003). Smith stresses the collaborative efforts of "waves of networks of activists who were largely skeptical, freethinking, agnostic, atheist, or theologically liberal; who were well educated and socially located mainly in knowledge-production occupations; and who generally espoused materialism, naturalism, positivism, and the privatization or extinction of religion." *Id.*

122   *Cf.* Peter J. Katzenstein, *Civilizational States, Secularisms, and Religions, in* RETHINKING SECULARISM, *supra* note 2, at 145, 145 (acknowledging though questioning the widespread "assumption that by privatizing religion, the Peace of Westphalia left international politics fully secular").

123   GERALD R. CRAGG, THE CHURCH AND THE AGE OF REASON, 1648–1789 (1960).

124   Craig Calhoun, *Secularism, Citizenship, and the Public Sphere, in* RETHINKING SECULARISM, *supra* note 2, at 75, 80 ("What issued from the 1648 Peace of Westphalia was not a Europe without religion but a Europe of mostly confessional states . . . .").

125   *See generally, e.g.*, ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION (2d ed. 2005) (arguing the framers and the founding documents they created reflect an intentionally secular state). For a discussion of the significance of this feature, see generally Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120 (2008).

national days of prayer.[126] A century later, the American Supreme Court declared that "this is a Christian nation."[127]

So then perhaps the dominance of the secular paradigm came about in the twentieth century? But at mid-century the Supreme Court asserted, in just slightly more ecumenical terms, that "we are a religious people whose institutions presuppose a Supreme Being."[128] Even today, and despite a professed constitutional prohibition on governmental endorsement of religion,[129] the nation's currency awkwardly reminds Americans of the national motto—"In God We Trust"—and courts have rejected constitutional challenges to the expression.[130]

The question of "When?" pushes us to notice a distinction that, though potentially crucial, often goes neglected by contemporary proponents of secular government. This distinction might be described as one between a "*secular paradigm* of legitimacy" and a "paradigm of *secular legitimacy.*" The first sort of position proposes secular *criteria of legitimacy*; the second holds that in order to have legitimacy, *governments* must be secular.

As an illustration, consider the proposition presented by the Declaration of Independence as a "self-evident" truth—that legitimate government must be based on the consent of the governed.[131] That proposition appears to be secular; it claims no theological foundation, and it traces political legitimacy to a human and this-worldly source (human consent), not a divine one.[132] Even so, the kind of government to which subjects freely consent might conceivably be a government that supports or endorses religion in various ways;[133] as noted,

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126   *See* JOHN T. NOONAN, JR., & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM 524–32 (3d ed. 2011) (presenting cases and other materials on early American communities officially recognizing religious activities).

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

128   Zorach v. Clauson, 343 U.S. 306, 313 (1952).

129   *See, e.g.*, Allegheny Cnty. v. Greater Pittsburgh ACLU, 492 U.S. 573, 578–79 (1989) (prohibiting a certain display of religious imagery on public property under the First Amendment).

130   *See, e.g.*, Newdow v. Lefevre, 598 F.3d 638, 643–46 (9th Cir. 2010).

131   *See* THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

132   To be sure, the Declaration does assert that the purpose of government is to protect rights with which humans are "endowed by their Creator." *Id.*; *cf.* George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1611 (1999) ("Behind those *created* equal stands a Creator, who is the source of our inalienable rights 'to life, liberty, and the pursuit of happiness.'" (citation omitted)).

133   *Cf.* Alfred Stepan, *The Multiple Secularisms of Modern Democratic and Non-Democratic Regimes, in* RETHINKING SECULARISM, *supra* note 2, at 114, 117. Stepan writes:

that was evidently the kind of government that Americans in the early republic understood themselves to be consenting to.[134] Conversely, during the earlier Christian period, it was commonly believed *on religious grounds* that governments should be "secular," in the sense that they were limited in their jurisdiction to the concerns of this world.[135] Roger Williams held a similar view.[136]

Thus, there can be paradigms of legitimacy that are secular, and that base legitimacy on secular criteria, but that allow for governments that are in important respects religious. Conversely, there can be religious or theological paradigms of legitimacy that require government to be secular.

As the Christian paradigm declined in the post-Reformation period, what first began to emerge, it seems, was a *secular paradigm* of legitimacy, not a paradigm of *secular legitimacy.* Thus, although the Peace of Westphalia may plausibly be viewed as officially abandoning the older Christian paradigm, it surely did not call for secular government. The treaty's central principle of *cuius regio eius religio*—the religion of the prince shall be the religion of the realm—implied that the prince did not receive authority from God or the church, as in the Christian paradigm, but rather the other way around: a religion acquired its status as the religion of a principality from the prince's decision. In this understanding, the "secular" authority seems to be primary, while religion's authority is derivative. Even so, this secular authority might nonetheless establish religion; indeed, as noted, the treaty ushered in the era of the confessional state.[137]

Similarly, the "self-evident truth" that government's authority is derived from the consent of the governed appears to be a secular proposition.[138] That proposition—and, more generally, the idea of popular sovereignty—was widely accepted in the early American

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> [F]or comparative purposes, . . . it is important to be aware of how many of the existing twenty-seven members of the European Union violate U.S. norms of a "wall of separation between the state and religion" but are nonetheless strong democracies. Indeed, any serious analysis of state policies toward religion in the twenty-seven European Union democracies documents that 100 percent of them fund religious education in some way; 89 percent have religious education in state schools as a standard offering (many, but not all, with the option not to attend); 44 percent fund the clergy, and 19 percent have established religions.

Id.

134   *See supra* note 126.
135   *See* SMITH, *supra* note 116, at 112–21.
136   *See* TIMOTHY L. HALL, SEPARATING CHURCH AND STATE 82–83 (1998).
137   *See supra* note 124.
138   *See supra* note 131 and accompanying text.

Republic.[139] As noted, though, the logic of the proposition does not require, and American citizens and leaders at the founding and afterwards did not seem to interpret the proposition as requiring, *government* to be thoroughly secular.[140] That idea—namely, that in order to claim legitimacy government itself must confine itself to the secular—seems to be a later and more contested arrival.[141]

To be sure, the more recent paradigm of secular legitimacy, as we may call it, arguably draws support from some of the same concerns and commitments that led to the secular paradigm of legitimacy—more specifically, from the ideal of government by consent, from the need for public peace, and from commitments to human equality. The distinctive condition of the modern world, it is commonly supposed, is pluralism—religious pluralism in particular.[142] Whatever might be true in a religiously homogeneous society, in a pluralistic world governments cannot lay claim to the consent of the governed if they also embrace sectarian beliefs that only some of their citizens accept. Or so it may seem. Moreover, such sectarianism would be disruptive of civil peace and stability. Such, it is supposed, is the lesson to be learned from the "wars of religion."[143] The *cuius regio eius religio* approach proved to be an untenable solution; not all subjects could be induced to accept the religion of the prince. In addition, given religious diversity, governmental endorsement of or support for religion will inevitably send a message of favoritism toward some citizens and of exclusion toward others; in this way, government would violate the fundamental commitment to treat all citizens equally.[144]

These arguments and conclusions are by now pervasive in the theorizing of influential philosophers like John Rawls.[145] The conclu-

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139   Gordon Wood, The Creation of the American Republic, 1776–1787, at 329–30 (1969).

140   *See supra* note 132. .

141   *Cf.* Maclure & Taylor, *supra* note 5, at 17 (asserting that their secularist conception of government "has appeared only recently in history").

142   *See id.* at 9–10; Rawls, supra note 31, at xviii–xxvi.

143   See *supra* note 119 and accompanying text for a discussion of the origins and ensuing political and intellectual response to these "wars of religion." For a vigorous challenge to this conventional view, see William T. Cavanaugh, The Myth of Religious Violence (2009).

144   *See* Maclure & Taylor, *supra* note 5, at 9; *see also* Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring). O'Connor wrote, "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688.

145   *See generally* Rawls, *supra* note 31, at 3–22 (discussing principles of liberty and equality as background for democracy).

sions are common in law as well. Thus, in the United States, the requirement of governmental secularity is explicitly affirmed in constitutional doctrine,[146] though not in the Constitution itself; other nations like France and Turkey go further and formally embrace a commitment to secularism in their constitutions.[147] Despite ongoing religious practices and expressions (such as the American national motto), therefore, prevalent and official understandings appear to embrace a sort of amalgamated secular paradigm of legitimacy and paradigm of secular legitimacy—an amalgam that we can continue to describe simply as the "secular paradigm." (Although we will make use of the distinction again later.)

B.   Strategies of Secularization

The secular paradigm emerged, and it has been maintained, under conditions in which many citizens—in some places, such as the United States, a sizable majority[148]—adhere to religion in one way or another. In securing and maintaining the secular paradigm, therefore, secular thinkers and governments grounded in the secular paradigm have employed the usual strategies of assimilation and marginalization.

1.   Promoting Secularism

Just as thinkers like Origen, Augustine, and later Aquinas developed intellectually sophisticated expositions and defenses of the Christian worldview,[149] modern scientists and philosophers have developed similarly sophisticated elaborations of a more naturalistic and hence secular worldview. Citations hardly seem necessary here: almost any major (or minor) thinker of the last several centuries— Locke, Hume, Kant, Marx, Darwin, Mill, Nietzsche, Freud, Weber— might be cited for the proposition. And just as societies committed to Christianity found ways to inculcate and promulgate Christian teachings through homilies, liturgy, and catechesis of various kinds, so soci-

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146   *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

147   *See* Ran Hirschl, Constitutional Theocracy 26–27 (2010). Hirschl reports that in 1928 Turkey removed the provision that "the religion of the Turkish State is Islam;" in 1937, the constitution was amended to provide that government should be "republican, popular, atheist, secular, and reformist." *Id.* at 27.

148   *See generally* Robert D. Putnam & David E. Campbell, American Grace (2010) (providing a comprehensive study of religion in modern American life and its role as both a unifying and dividing force).

149   *See supra* Part III.

eties grounded in the secular paradigm have developed ways to communicate the secular worldview to their subjects.

One major seminary of secularization has been the public schools. Martin Marty explains that democracy "has few temples or churches or synagogues. But it has an 'established church' in the field of public education."[150] And over at least the last few decades, the gospel communicated in that "established church" has been a resolutely secular one. Thus, courts in the United States have been vigilant in forbidding any religious influence in the schools, such as prayer or Bible reading.[151] An attempt to eliminate the teaching of evolution (in deference, the Supreme Court believed, to religion) was ruled unconstitutional;[152] and efforts to "balance" such teaching by giving equal time to theories of creationism or intelligent design, or even to warn that evolution is "only a theory," have been sternly rebuffed in the courts.[153]

Proponents of a secular worldview have thus looked to public schools as a principal ally. Writing in *The Humanist*, Paul Blanshard observed: "I think the most important factor moving us toward a secu-

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150   John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 312 n.175 (2001) (quoting MARTIN E. MARTY, THE NEW SHAPE OF AMERICAN RELIGION 80 (1958)) (internal quotation marks omitted). In a similar vein, the distinguished historian of religion Sidney Mead observed that:

> The public schools in the United States took over one of the basic responsibilities that traditionally was always assumed by an established church. In this sense the public school system of the United States *is* its established church.

BRUCE C. DIERENFIELD, THE BATTLE OVER SCHOOL PRAYER 19 (2007) (internal quotation marks omitted).

151   *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000); Lee v. Weisman, 505 U.S. 577, 587 (1992); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 224–27 (1963). For a more extensive discussion, see Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 949–64 (2011). Given that the existence of religion is a fact about the world, schools are permitted to teach *about* it—in history classes, for example—but they must do so in an objective fashion.

152   Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

153   *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 586 n.6 (1987); Kitzmiller v. Dover Area Sch. Dist, 400 F. Supp. 2d 707, 711, 716–17 (M.D. Pa. 2005). Joseph Vining finds this censoriousness curious. *See* JOSEPH VINING, THE SONG SPARROW AND THE CHILD 28 (2004). "Strange," he remarks, "this struggle over the minds of young children—one might think that the theory of evolution, appealing, simple, fertile, fascinating, like a beautiful equation in mathematics, could fend for itself when presented to curious young minds." *Id.* But if public schools are seen as the symbol and seminary, so to speak, of secular democracy, then it is perhaps understandable that their guardians would insist on keeping them free of the taint of views subversive of that paradigm, just as churchmen were keen on keeping heresy out of the church.

lar society has been the educational factor. Our schools may not teach Johnny to read properly, but the fact that Johnny is in school until he is sixteen tends toward the elimination of religious superstition."[154] Charles Francis Potter, a signer of the *Humanist Manifesto I*, wrote:

> Education is . . . a most powerful ally of Humanism, and every American public school is a school of Humanism. What can the theistic Sunday schools, meeting for an hour once a week, and teaching only a fraction of the children, do to stem the tide of a five-day program of humanistic teaching?[155]

More recently, Sanford Levinson argues for minimal accommodations sufficient to keep religious students in public schools precisely because such schools will have an overall secularizing effect.[156] "[C]andor requires me to admit," Levinson says, that

> one reason I would prefer [Christian fundamentalist] children . . . to attend the public schools is precisely to increase the likelihood that they might be lured away from the views—some of them only foolish, others, alas, quite pernicious—of their parents. Perhaps they will meet and begin talking with, and learning from, more secular students.[157]

Thus, Levinson acknowledges that "[m]y desire to 'lure' religious parents back to the public schools thus has at least a trace of the spider's web about it."[158]

Officially, at least, constitutional doctrine does not embrace the agenda of Blanshard, Potter, and Levinson. The secular curriculum is not intended to undermine religion, but rather is presented as neutral toward religion.[159] But decisions prescribing secular public schools do assume and assert that religion is an essentially private matter,[160] and that the public order should be secular; in this way they promote,

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154 James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism, in* Articles of Faith, Articles of Peace 54, 70 (James Davison Hunter & Os Guinness eds., 1990) (internal quotation marks omitted).

155 *Id.* (internal quotation marks omitted).

156 Sanford Levinson, *Some Reflections on Multiculturalism, "Equal Concern and Respect," and the Establishment Clause of the First Amendment*, 27 U. Rich. L. Rev. 989, 1020 (1993).

157 *Id.* at 1019.

158 *Id.* at 1020.

159 *See* Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968).

160 *See, e.g.*, Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 398 (1985) ("'[T]he Constitution decrees that religion must be a private matter for the individual, the family, and institutions of private choice . . . .'" (quoting Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (Douglas, J., concurring))).

if not a *comprehensive* secularism, at least a public or *political* secular-ism,[161] and thus a secular paradigm of governmental legitimacy.

And yet it seems that the schools have been less successful in inculcating secularism, or even public or political secularism, than some secularists have hoped. Religion was a potent force—and a potent *political* force—at the time of Locke, and of Jefferson, and to the surprise of some, it remains a potent force today, at least in many countries (including the United States).[162] The continuing signifi-cance of religion has been the occasion for two of the most central strategies employed in support of the secular paradigm.

2. Projection: the "Secularization Hypothesis."

One of these strategies involves projection. While acknowledging the present significance of religion, secular thinkers have repeatedly predicted that as societies become more modern, urbanized, and edu-cated, religion is destined to dwindle. José Casanova explains:

> In one form or another, with the possible exception of Alexis de Tocqueville, Vilfredo Pareto, and William James, the thesis of secu-larization was shared by all the founding fathers: from Karl Marx to John Stuart Mill, from Auguste Comte to Herbert Spencer, from E.B. Tylor to James Frazer, from Ferdinand Toennies to Georg Sim-mel, from Emile Durkheim to Max Weber, from Wilhelm Wundt to Sigmund Freud, from Lester Ward to William G. Sumner, from Robert Park to George H. Mead. Indeed, the consensus was such that not only did the theory remain uncontested but apparently it was not even necessary to test it, since everybody took it for granted.[163]

In this view, the continuing existence of religion and religious believers was a short-term hindrance. Resistance was quixotic; secular-ism had the massive advantage of historical inevitability.

3. Annexation and Marginalization: the Neutrality Strategy.

A second device for maintaining the secular paradigm, even in the midst of pervasively religious populations, has been the neutrality strategy. The basic claim, asserted by now in hundreds of judicial

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161 The distinction is analogous to Rawls's distinction between "political liber-alism" and "comprehensive liberalism." RAWLS, *supra* note 31, at xxix.

162 *See infra* notes 180–182 and accompanying text.

163 JOSÉ CASANOVA, PUBLIC RELIGION IN THE MODERN WORLD 17 (1994); *see also* DAVID MARTIN, ON SECULARIZATION 9 (2005) (explaining "the ubiquity of seculariza-tion stories, and the varied ways they combine prescription and description").

decisions as well as in academic literature,[164] has been that governmental secularity is neither favorable nor unfavorable to religion, but merely neutral.

The neutrality claim sounds in both the annexation and marginalization strategies. If it is true that a secular government is simply neutral toward religion, then there is no incompatibility between religion and secular government. Unthreatened, religion and religionists ought to be able cheerfully to acquiesce in the benign ministrations of the secular state.

This annexation, however, also entails a kind of marginalization, as (depending on what version of secularism is being invoked)[165] religion is pushed out of politics and law and restricted to the private sphere.[166] Moreover, religionists who decline to support this ostensibly "neutral" regime are depicted as obstreperous and unassimilable—as "unreasonable," in Rawls's framework[167]—and thus as people whose views a secular liberal polity cannot be expected to respect or accommodate. In addition to being marginalized as illiberal and unreasonable, the adherents of what is sometimes called "strong religion" are also often depicted as pitiably ignorant and unthinking—H. L. Mencken's influential stories during the Scopes trial[168] are merely one manifestation of this genre[169]—and hence as alien to a society that aspires to enlightened inclusiveness.

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164 *See, e.g.*, MACLURE & TAYLOR, *supra* note 5, at 9–13, 19–22. For instances and discussion, see generally Steven D. Smith, *The Paralyzing Paradox of Religious Neutrality* (San Diego Legal Studies Paper No. 11-060, 2011), *available at* http://ssrn.com/abstract=1911399

165 Jocelyn Maclure and Charles Taylor distinguish between what they call "republican" and "liberal-pluralist" versions of secularism. MACLURE & TAYLOR, *supra* note 5, at 27–52. The republican versions, typified by French *laïcité*, attempt rigorously to confine religion to the private sphere. *Id.* The liberal-pluralist versions are more open to the appearance of religion in public space but nonetheless attempt to keep government and political decision-making secular. *Id.*

166 *See supra* Part IV.B.

167 RAWLS, *supra* note 31, at 61, 64.

168 Perhaps the best known journalist of his day, Mencken issued regular and colorful reports from the trial, consistently deprecating William Jennings Bryan and his supporters—he described them as "morons" and referred sardonically to "the so-called minds of these fundamentalists of upland Tennessee"—and glorifying Bryan's famous opponent, Clarence Darrow. *See* EDWARD J. LARSON, SUMMER FOR THE GODS 165 (1997). These depictions were further exaggerated in the popular play and movie *Inherit the Wind*; a *Time* magazine review at the time contended that "[t]he script wildly and unjustly caricatures the fundamentalists as vicious and narrow minded hypocrites," and "just as wildly and unjustly idealizes their opponents, as personified by Darrow." *Id.* at 243 (internal quotation marks omitted). In an illuminating history of the trial and its effects, Edward Larson observed that "[a]fter the Scopes

These strategies of using "neutrality" to incorporate and to marginalize were on display in the case of *Epperson v. Arkansas*, in which the American Supreme Court invalidated a state law prohibiting the teaching of evolution in the public schools.[170] The Court emphasized the schools' obligation of "absolute" neutrality toward religion; schools are constitutionally forbidden, the Court said, to do or teach anything that would either "aid or oppose" any religion.[171] The Court's supposition, it seems, was that teaching evolution was not inconsistent with or subversive of any religion (although the Court's own account of Arkansas's reason for adopting the law contradicted this supposition[172]); hence, religionists could safely accept their incorporation into a constitutional regime committed to governmental secularity.

More tangentially, the Court inserted two curious, mocking footnotes that served no apparent purpose except to ridicule opponents of evolution.[173] These footnotes had no discernible relevance to the Court's legal analysis, and they arguably detracted from the stance of benign neutrality that the Court purported to assume. Their func-

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trial, elite American society stopped taking fundamentalists and their ideas seriously." *Id.* at 233.

169   *See also* CHRISTOPHER HITCHENS, GOD IS NOT GREAT 229 (2007). Hitchens suggests that religion "is a man-made imposition, and that it has been an enemy of science and inquiry, and that it has subsisted largely on lies and fears, and been the accomplice of ignorance and guilt as well as of slavery, genocide, racism, and tyranny." *Id.*

170   Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

171   *Id.* at 106. (internal quotation marks omitted).

172   The Court declared that "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man." *Id.* at 107. But if the theory of evolution is "contrary to the [religious] belief of some," *id.*, then how does the teaching of evolution in public schools not "oppose" that species of religion? *Id.* at 106.

173   In footnote 9, the Court remarked:

> Clarence Darrow, who was counsel for the defense in the *Scopes* trial, in his biography published in 1932, somewhat sardonically pointed out that States with anti-evolution laws did not insist upon the fundamentalist theory in all respects. He said: "I understand that the States of Tennessee and Mississippi both continue to teach that the earth is round and that the revolution on its axis brings the day and night, in spite of all opposition."

Id. at 102 n.9 (quoting CLARENCE DARROW, THE STORY OF MY LIFE 247 (1932)). In footnote 10, the Court recited: "[Hofstadter and Metzger] refer to some of Darwin's opponents as 'exhibiting a kind of phylogenetic snobbery [which led them] to think that Darwin had libeled the [human] race by discovering simian rather than seraphic ancestors.'" *Id.* at n.10 (quoting R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 324 (1955)).

tion, it seems, was rhetorical; they resonated with a common strategy among proponents of secularism for marginalizing religionists whose creeds are difficult to reconcile with the secular paradigm by depicting such believers as ignorant and unthinking.

C. The Frustrations of the Secular Strategies

For a period in the mid-twentieth century, these strategies—namely, projecting the inevitability of secularization, and incorporating some forms of religion while marginalizing other forms by presenting governmental secularity as "neutral" toward "religion"—seem to have enjoyed considerable success. At least in American jurisprudence, the notions that government must be "secular," and that a secular government is simply "neutral" toward religion, seemed to be widely accepted as axiomatic truths.[174] Indeed, the commitment to "neutrality" still goes largely unquestioned in the case law of the American Supreme Court.[175]

Despite earlier prosperity, however, challenges to the secular paradigm have become more conspicuous and vigorous. And at present, the strategies that worked relatively well a few decades ago seem to be having less success in deflecting the challenges.

1. The Failure of the Secularization Hypothesis.

Writing in 1968, the sociologist Peter Berger expressed a common view in predicting that "[b]y the 21st century, religious believers

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174   For further discussion and illustration, see Smith, *supra* note 151, at 991–1005 .

175   *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 873 (2005). For a European example, see Svyato-Mykhaylivska Parafiya v. Ukraine, App. No. 77703/01, 2007 Eur. Ct. H.R. 478, para. 113 (declaring "[t]he State's duty of neutrality and impartiality" with respect to religious beliefs), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81067. However, the judges on the European Court of Human Rights have recently demonstrated greater awareness of the tenuous nature of the equation of secularism with neutrality. Lautsi v. Italy, App. No. 30814/06, 3 Eur. Ct. H.R. Rep. 60, 88 (2012) (concluding that the use of crosses on the walls of public school classrooms in Italy is within the "margin of appreciation" in which deference to national traditions is warranted). See in particular the concurring opinion of Judge Ann Power:

> Neutrality requires a pluralist approach on the part of the State, not a secularist one. It encourages respect for all world views rather than a preference for one. To my mind, the Chamber Judgment was striking in its failure to recognise that secularism (which was the applicant's preferred belief or world view) was, in itself, one ideology among others. A preference for secularism over alternative world views—whether religious, philosophical[,] or otherwise—is not a neutral option.

Id. at 98 (Power, J., concurring).

are likely to be found only in small sects, huddled together to resist a worldwide secular culture."[176] By century's end, Berger told a different story. "[T]he assumption that we live in a secularized world is false," Berger declared:

> The world today, with [the] exceptions [of Europe and of "an international subculture composed of people with Western-type higher education"], is as furiously religious as it ever was, and in some place more so than ever. This means that a whole body of literature by historians and social scientists loosely labeled "secularization theory" is essentially mistaken.[177]

Rather than abandoning the secularization hypothesis, other theorists narrow and refine the claim.[178] The sort of secularization that accompanies modernization, perhaps, is not a comprehensive secularism in which religion dwindles away altogether, but rather a more institutional and political secularism in which religion, while continuing to flourish, retreats to the private sphere. This more modest version fits nicely with the paradigm of secular legitimacy, and with modern American constitutional jurisprudence, which holds, once again, that religion is free to flourish in private but that *government* is supposed to be secular.

The problem is that just as empirical realities disconfirm the secularization hypothesis in its general "decline of religion" version, those realities make trouble for the narrower, political version as well. That is because in many parts of the world, including most obviously the Islamic world but also the United States, religion has not accepted its prescribed banishment from politics or its relegation to the private domain. In a recent book called *God's Century*, three political scientists argue that religion continues to be a powerful force in politics worldwide and is likely to remain so in coming decades.[179] Indeed, both religion and religious influence on politics have actually become stronger over the last several decades.[180] In a similar vein, the Cana-

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176 Peter Berger, *A Bleak Outlook is Seen for Religion*, N.Y. TIMES, Feb. 25, 1968, at 3.

177 Peter Berger, *The Desecularization of the World: A Global Overview, in* The Desecularization of the World 1, 2 (Peter L. Berger ed., 1999).

178 *See, e.g.*, CASANOVA, *supra* note 163, at 6 ("I do not share the view that secularization was, or is, a myth. The core of the theory of secularization, the thesis of the differentiation and emancipation of the secular spheres from religious institutions and norms, remains valid."). By now thinkers like Charles Taylor have developed a variety of versions and accounts of secularization that do not embrace the older "decline of religion" idea. See, for example, the essays in Rethinking Secularism, *supra* note 2.

179 MONICA DUFFY TOFT ET AL., GOD'S CENTURY 1–2 (2011).

180 *Id.* With respect to religion itself, the authors explain that "[c]ontrary to . . . predictions, the portion of the world population adhering to Catholic Christianity,

dian political scientist Ran Hirschl reports that "approximately half of the world's population, perhaps more, now lives in polities where religion not only has remained public but also has been playing a key role in political and constitutional life."[181]

The continuing presence of religion in politics deprives the secular paradigm of one of its more powerful appeals—namely, the claim of irresistibility based on the assumption that the movement of history is inexorably toward ever greater secularization. Proponents of the secular paradigm understandably lament the loss of that claim. Although their lamentations and predictions of imminent theocracy can sometimes seem a bit overwrought,[182] the lamenters correctly perceive that the powerful ongoing engagement of religion with politics represents not merely an adverse political movement—adverse from a secularist perspective—but a challenge to the fundamental paradigm of legitimacy, which they have regarded as axiomatic.

Other versions of a secularization hypothesis may be more plausible. Charles Taylor argues, for example, for a more nuanced interpretation in which religion does not disappear, either in general or from politics, but the basic character of religious belief changes.[183] In past centuries, Taylor contends, religious belief was virtually universal and culturally mandatory. Today, by contrast, even where religion persists it is one option among many. And a belief that is understood to be both optional and embattled[184] is not the same sort of self-confident thing as a belief that is taken as axiomatic.[185]

Protestant Christianity, Islam, and Hinduism jumped from 50 percent in 1900 to 64 percent in 2000." *Id.* at 2. Moreover, "a dramatic and worldwide increase in the political influence of religion has occurred in roughly the past forty years." *Id.* at 9 (emphasis deleted).

181   HIRSCHL, *supra* note 147, at 47.

182   *See, e.g.*, KEVIN PHILLIPS, AMERICAN THEOCRACY xiii—xiv (2006). (analyzing "strong theocratic pressures [that] are already visible in the Republican national coalitions and its leadership, while the substantial portion of Christian America committed to theories of Armageddon and the inerrancy of the Bible has already made the GOP into America's first religious party"). Ronald Dworkin reports—it is not quite clear whether he shares the horror—that "[m]any Americans are horrified by the prospect of a new dark age imposed by militant superstition; they fear a black, know-nothing night of ignorance in which America becomes an intellectually backward and stagnant theocracy." RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 79 (2006).

183   *See, generally, e.g.*, TAYLOR, *supra* note 117, at 539.

184   *See, e.g., id.* ("[I]t [is] so hard to believe in God in (many milieux of) the modern West, while in 1500 it was virtually impossible not to[.]").

185   This thesis runs through Taylor's lengthy book. *See id.*

Taylor's interpretation of secular modernity has been chal-
lenged,[186] but for present purposes the important point is that even if
his description of our situation is correct, it provides frail support at
best for the secular paradigm of political legitimacy. If religious prem-
ises (including premises relevant to politics and government) are
optional today—not generally shared and hence in that sense "secta-
rian"—then exclusively secular premises are optional and "sectarian"
as well. Hence, the arguments that have typically been directed
against religion in politics—that religion is partisan and hence
polarizing and incapable of commanding general consent—may be
plausible, but they apply equally to the claim that government must be
confined to the secular. The so-called "culture wars" provide ample
evidence of such polarization in the United States.[187]

This observation points us to the problem with the other major
strategy that has supported the secular paradigm.

2.   The Failure of the Neutrality Strategy.

Although courts and theorists have supposed that government
can be neutral toward religion by remaining secular, the increasingly
obvious fact is that governmental secularity is not a loftily neutral posi-
tion floating above the fray of religious and anti-religious views; rather
such neutrality is itself one competing position among others. The
pretensions of neutrality depend on the assumption that religion just
is, inherently, a private phenomenon. In reality, though, a good deal
of religion has a public dimension and public implications. Moreo-
ver, this sort of public-oriented religion is not just the property of a
few marginal characters—so-called Christian Reconstructionists,[188] for
example. In the United States, religion with a public dimension
includes the faiths of millions of citizens, past and present, including
luminaries such as Washington, Jefferson, and Lincoln.[189] A secular
"neutrality" that would push the religion of these millions out of the
public sphere is decidedly not neutral toward religion in any meaning-
ful sense.[190]

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186   *See, e.g.,* José Casanova, *A Secular Age: Dawn or Twilight?, in* VARIETIES OF SECU-
LARISM IN A SECULAR AGE 265, 280–81 (Michael Warner, et al., eds., 2010).

187   *See* JAMES DAVISON HUNTER & ALAN WOLFE, IS THERE A CULTURE WAR? 1–9
(2006); JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA
70–72 (1991).

188   *See, e.g.,* ROUSAS JOHN RUSHDOONY, CHRISTIANITY AND THE STATE (1986).

189   *See* Smith, supra note 151, at 970–72, 979–81.

190   I have developed this point at much greater length in Smith, *supra* note
164and STEVEN D. SMITH, FOREORDAINED FAILURE 77–97 (1995).

Moreover, the expansion of the public sphere makes claims of religious neutrality all the more obviously untenable. A society that sponsored no public schools, or that supported schools devoted to a narrow curriculum of basic skills and vocational training, might avoid many conflicts with religion.[191] As the schools' agenda becomes more ambitious, conversely, conflicts inevitably proliferate. The seemingly perennial controversy over evolution illustrates the problem. In *Epperson v. Arkansas*, as noted, the Court struck down an Arkansas law, adopted in the 1920s, which prohibited the teaching of evolution in the public schools.[192] In *Epperson* the Court was more than normally emphatic about the "absolute" obligation of neutrality.[193] The Court also said that Arkansas had adopted the law in order to insulate fundamentalist faiths against contrary views; this ascribed motivation made the law less than neutral toward religion, and hence constitutionally invalid.[194] But on the Court's own premises—namely, that evolution directly contradicts the teachings of some religions and that the Constitution imposes an "absolute" prohibition against a school curriculum that "'aid[s] or oppose[s]' any religion"—it follows with at least equal logical force that the *teaching of evolution* in the public schools opposes some forms of religion, and hence violates neutrality, and hence is constitutionally prohibited.[195]

The commitment to neutrality is nonetheless deeply entrenched and probably indispensable to the maintenance of the secular paradigm, at least in its amalgamated form,[196] and so judicial and academic defenders rally to its support. The effort has led to increasingly

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191   Many, but not all. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972).

192   Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

193   "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice," the Court solemnly intoned. *Id.* at 103–04. Consequently, "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion. *This prohibition is absolute.*" *Id.* at 106 (emphasis added) (citations omitted).

194   *Id.* at 107–09.

195   *Id.* at 106. Justice Black made the point in his concurring opinion. *See id.* at 113 ("If the theory [of evolution] is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advocate such an 'anti-religious' doctrine to schoolchildren?"). I say with at least equal logical force because in fact the Court's own conclusion requires an additional premise, namely, that the Constitution prohibits laws or measures that might not themselves "aid or oppose" religion but that are *motivated by* a purpose of aiding or opposing religion—–that might be contestable, and that the counterargument does not require.

196   *See supra* note 174 and accompanying text.

complex and sophisticated elaborations and defenses of neutrality.[197] These more sophisticated versions have been criticized at length else-where,[198] and it would be too circuitous to plunge into the full debate here. For now, an overall observation may suffice: "neutrality" is a term that can be (and has been) used in a variety of ways, and there are no doubt versions and usages under which a government that remains steadfastly secular can be said to be "neutral" toward religion. Unfortunately, when "neutrality" is defined in these more refined senses, a position of neutrality no longer answers to the purposes which made neutrality (including "secular neutrality") attractive in the first place. In short, the kinds of neutrality that are possible are not the kinds that can deliver what was promised.

One example may serve to illustrate the problem. In response to the incontrovertible fact that many government policies and pro-nouncements run contrary to the religious beliefs of some citizens,[199] some proponents of neutrality argue that the ideal requires only that government avoid *explicitly* indicating disapproval of any religious belief or position. Government can speak and act in ways that *implic-itly* indicate judgments about some people's religious beliefs so long as those judgments are not overtly stated.[200] Andrew Koppelman, a lead-ing proponent of neutrality and of this particular construction, insists that it is necessary to limit the neutrality requirement to explicit pro-nouncements because a more expansive requirement would demand the impossible; that is because "any time the state does anything, it is implicitly endorsing some religious claims and rejecting others."[201]

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197   For one ambitious effort in this vein, see ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013).

198   *See, e.g.*, Smith, *supra* note 164, at 1.

199   *See, e.g.*, Kent Greenawalt, *Five Questions about Religion Judges Are Afraid to Ask, in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 196, 199 (Nancy L. Rosenblum ed., 2000).

> A court orders a state to desegregate its schools, the country goes to war, educational funds are made available equally to men and women. The gov-ernment has implicitly rejected religious notions that (1) God wishes rigid racial separation, (2) all killing in war violates God's commandments, (3) all women should occupy themselves with domestic tasks. A vast array of laws and policies similarly imply the incorrectness of particular religious views.

Id.

200   *See, e.g.*, FRANKLIN I. GAMWELL, THE MEANING OF RELIGIOUS FREEDOM 185–95 (1995); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 885 (2009); Steven H. Shiffrin, *Liberalism and the Establish-ment Clause*, 78 CHI.-KENT L. REV. 717, 726–27 (2003);

201   Koppelman, *supra* note 200, at 885.

He illustrates the point by observing that even a murder law implicitly rejects Aztec religious beliefs favoring human sacrifice.[202]

Koppelman is right that in a nation of over three hundred million diversely minded citizens, it is a fair bet that almost anything government does will be at odds with the religious beliefs of at least a few citizens. When government wages war, it at least tacitly rejects the views of religious pacifists, such as Quakers, who believe that war is always wrong. Laws requiring parents to obtain medical treatment for their children reject the beliefs of parents—Christian Scientists and others—who are religiously opposed to such treatment. But these observations merely show that meaningful religious neutrality is impossible, and that governmental secularity does not come close to achieving such neutrality. And the introduction of a distinction between explicit and implicit pronouncements on religion does little to address the substantive difficulty.

For one thing, the implicit/explicit distinction is an elusive one.[203] Suppose a biology teacher in a public school declares, "All of the scientific evidence indicates that life evolved over millions of years." Is this an "explicit" or "implicit" rejection of the belief (held, it seems, by thousands or even millions of Americans[204]) that the world was created by God more recently and in a much shorter period? And why should it matter anyway? If government says or does things that clearly reject some people's religious beliefs, and that are perceived as doing so, why should it matter whether the rejection is "explicit" or "implicit"? Either way, the judgment of rejection is both real and understood,[205] and the same problems of divisiveness, inequality, and

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202   *Id.*

203   For criticism of the distinction, see Steven D. Smith, Barnette*'s Big Blunder*, 78 Chi.-Kent L. Rev. 625, 645–47 (2003).

204   *See* Putnam & Campbell, *supra* note 148, at 21–22.

205   Indeed, Koppelman himself elsewhere recognizes and even insists on the point; he contends that laws based on religious beliefs violate the Constitution by implicitly endorsing religion and thereby violating neutrality. *See* Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 110–12 (2002).

> The axiom that government may not declare religious truth entails restrictions on government conduct. It is a familiar point in free speech law that conduct which is not itself speech may nonetheless communicate a message and so be appropriately treated as speech. This means that the Establishment Clause's restriction on government speech is also a restriction on symbolic conduct. If government cannot declare religious truth, then it cannot engage in conduct the meaning of which is a declaration of religious truth . . . .

> Suppose a statute is passed that makes it a crime for anyone to break the commandment to obey the Sabbath, as that commandment is understood by

alienation are presented (as the ongoing struggles over the teaching of evolution in American schools attest).

In sum, it is possible to define neutrality down so as to make it attainable. But the attainable neutrality does not do what neutrality was supposed to do or avoid the problems that neutrality was supposed to avoid.

In the past, and still, defenders of secular neutrality have often tried to deal with these difficulties by marginalizing citizens who cannot be assimilated into the secular vision of government. We have already seen how in *Epperson* the Supreme Court depicted religious fundamentalists as ignorant and unthinking, much in the way H. L. Mencken had done during the Scopes trial.[206] In a similar vein, John Rawls dismisses citizens unwilling to join his posited "overlapping consensus" as "unreasonable."[207] The effectiveness of these marginalizing tactics may be parasitic on the secularization hypothesis, discussed earlier. *Epperson* was decided in the same year as Peter Berger's forecast that by the twenty-first century, religious believers would be "found only in small sects, huddled together to resist a world-side secular culture."[208] For those confident in such forecasts, it might seem both possible and appropriate to treat dissenters as a transitory annoyance, worthy mainly of mockery. But subsequent developments have indicated that citizens who in one way or another reject the secular paradigm have declined to follow the script and exit the scene—either the cultural scene or the political one. They refuse to acquiesce in marginalization, and they evidently number in the millions (or perhaps, globally, in the billions[209]). The secular paradigm thus faces a challenge that it has not managed to meet or deflect.

> Orthodox Jews. That is, the law makes it a felony to operate machinery on the Sabbath, to drive a car, to turn on an electric appliance, or to make a telephone call, and the law applies to private as well as public conduct, so that one can violate it by turning on the television while one is alone at home. There is no substantive constitutional right to do any of these things. The problem with this law lies in the message it contains: It implicitly asserts the correctness of the commandment to keep the Sabbath holy and of the Orthodox rabbis' interpretation of that sentence. It declares religious truth.

Id. (footnotes omitted).

206   *See supra* notes 165–172 and accompanying text. For a more recent instance of such mockery in a Supreme Court majority opinion, see McCreary County v. ACLU, 545 U.S. 844, 872–73 (2005). For a discussion, see Smith, *supra* note 151, at 1014–15.

207   *See* Rawls, *supra* note 31; *infra* notes 213, 216, 219.

208   *See* Berger, *supra* note 177.

209   *See supra* notes 175–176 and accompanying text.

D.   Condition of Crisis

At present, therefore, the secular paradigm would seem to be in serious distress. Our situation is similar to the kind of "crisis" described by Kuhn,[210] in which leading authorities come to the defense of an embattled paradigm and yet are unable to defeat challenges or successfully to conceal the increasingly conspicuous anomalies and incongruities.

A political theory like that of John Rawls[211] can be understood as this sort of impressively sophisticated but ultimately unavailing exercise in the defense of a floundering paradigm. In Rawls's vision of political liberalism, responsible citizens and officials would bracket their "comprehensive doctrines" (including, most obviously, their religious faiths) for purposes of deliberating about and deciding the most important public issues, and would confine themselves to the kind of "public reason"[212] that works from and within a supposed "overlapping consensus."[213] But the increasingly stark fact is that this ostensible "consensus" excludes millions of Americans[214]—globally, the exclusion would be much more sweeping[215]—and Rawls's effort to mitigate the exclusion by pronouncing these citizens and their views "unreasonable" began to look simply arbitrary and even authoritarian.[216] To be sure, Rawls attempted over time to reduce the exclusionary character of his position by tweaking its constraints—he introduced the "wide view" of public reason and the so-called "proviso"[217]—but these adjustments were more cosmetic than substantial.

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210 *See* KUHN, *supra* note 19, at 66–76; *supra* notes 35–37 and accompanying text.

211 RAWLS, *supra* note 31, at 243 n.32.

212 *See id.* at 212–54.

213 The contemplated "overlapping consensus" would reflect agreement not about "comprehensive doctrines" but, on the contrary, about a "political conception of justice" which is not dependent on any particular comprehensive doctrine. *Id.* at 39.

214 *See infra* note 221 and accompanying text.

215 *See supra* note 209 and accompanying text.

216 In a much noted footnote, for example, Rawls pronounced "to that extent unreasonable" any doctrine (and presumably any person embracing such a doctrine) that would restrict abortion beyond approximately the trimester framework of *Roe v. Wade*. RAWLS, *supra* note 31, at 243 n.32. Millions of Americans were thereby marginalized in an (admittedly long) peremptory footnote. For some backtracking, see *id.* at lv n.31.

217 Originally, Rawls debated whether political liberalism supported the "exclusive view" of public reason, which would categorically exclude invocation of comprehensive doctrines, or the "inclusive view," which would "allow[ ] citizens, *in certain situations*, to present what they regard as the basis of political values rooted in their comprehensive doctrine, *provided they do this in ways that strengthen the ideal of public reason itself.*" *Id.* at 247 (emphasis added). He concluded that the proper view could

Although its precise meaning is less than clear, for example, the implication of Rawls's "proviso" seems to be that religious citizens are free to participate in public debate, and to assert their religious beliefs, so long as outcomes can nonetheless be justified without reference to these religious contributions. But this amounts to saying that religious citizens can participate in public decision-making so long as their religious contribution makes no difference to outcomes.

Only a sympathizer determined to stick with Rawls's position through thick and thin could find this sort of illusory accommodation an adequate answer to the problem of exclusion. Imagine a similar solution to earlier battles over racial discrimination in voting: racial minorities will be permitted to vote, "provided that in due course [non-minority votes are cast] sufficient to support whatever [outcome racial minorities may have favored]."[218]

The fact is that although Rawls's position might fit comfortably enough in a largely secularized culture—and it may be that this is indeed the sort of subculture that liberal theorists inhabit[219]—it will continue to seem alien and hostile to many ordinary citizens. Noah Feldman observes that "constitutional decisions marginalizing or banning religion from public places have managed to alienate millions of people who are also sincerely committed to an inclusive American project."[220] In a similar vein, Peter Berger explains:

> A purely secular view of reality has its principal social location in an
> elite culture that, not surprisingly, is resented by large numbers of

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vary with historical and social circumstances. *Id.* at 247–54, while acknowledging (in what critics may take as a wry understatement) that "much more would have to be said to make this suggestion at all convincing . . . ." *Id.* at 251. Later, Rawls explicitly revised this position to adopt what he called the "wide view" elaborated by "the proviso," which held that "[comprehensive] doctrines may be introduced in public reason at any time, provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support." *Id.* at li–lii.

218 John Horton, *Rawls, Public Reason and the Limits of Liberal Justification* 1, 12 (Political Studies Association-UK 50th Annual Conference 2000), *available at* http://www.psa.ac.uk/cps/2000/Horton%20John.pdf.

219 Commenting on the spectacle of "[l]iberal ideologues, who celebrate tolerance and pluralism while at the same time condemning any meaningful dissent from their own thin idea of the good as not merely wrong but contrary to the dictates of reason itself," Paul Campos speculates that Rawlsian claims about "reasonable[ness]" and the "overlapping consensus" can enjoy plausibility only among a select group of academicians whose world is effectively limited to those who "work at the same institutions, attend the same conferences, read the same newspapers, live in the same suburbs, and send their children to the same schools . . . ." Paul F. Campos, *Secular Fundamentalism, in* AGAINST THE LAW 181, 200–02 (Paul F. Campos et al. eds., 1996).

220 NOAH FELDMAN, DIVIDED BY GOD 15 (2005).

> people who are not part of it but who feel its influence (most troublingly, as their children are subjected to an education that ignores or even directly attacks their own beliefs and values).[221]

Berger's description fits almost exactly with Arnold Toynbee's account of a society in the phase of "breakdown." What was once a "creative minority" has lost its power to elicit the free and genuine respect of many in the broader society, and has thus become a "dominant minority" that rules largely by virtue of position and power. In opposition to this dominant minority stands an "internal proletariat" that exhibits "a consciousness—and the resentment that this consciousness inspires—of being disinherited from [their] ancestral place in society."[222]

In the United States, evidence of such consciousness is on daily display in the so-called "culture wars."[223] On a more global scale, Ran Hirschl describes a similar phenomenon:

> In terms of demographic indicators, support for religious parties in these countries [including Israel, Malaysia, Turkey, and Egypt] is often closely associated with the relative have-nots and is distinctly more prevalent among occupiers of the sidelines, economic and cultural. Secularism and cosmopolitanism, on the other hand, are often associated with the metaphorical center. It often comprises old elites, the urban intelligentsia, and the managerial class and is characteristic of the relative haves, members of the upper socioeconomic echelons.[224]

In this Essay, of course, we have been considering not society or societies in general, but rather only one aspect of a society—namely, the pertinent background beliefs that make up a society's "paradigm of legitimacy." But insofar as the paradigm of legitimacy in America and various other democratic societies has been a secular one, Toynbee's description fits: the secular paradigm is in a condition of breakdown, and seems currently to be a source of "schism in the body social."[225]

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221 Berger, *supra* note 177, at 11.
222 5 ARNOLD J. TOYNBEE, A STUDY OF HISTORY 63 (D.C. Somervell abr. 1946).
223 *Cf.* 1 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY 423 (2010) (describing the escalating series of provocations and legal claims from both sides of the "culture wars").
224 HIRSCHL, *supra* note 147, at 11; *see also* Bhargava, *supra* note 8, at 100 ("[E]xclusion from the larger public sphere forces the religious to form their own narrow public where resentment and prejudice will flourish.").
225 RECONSIDERATIONS, *supra* note 45, at 48–243.

V. CONCLUSION: WHITHER?

So, what may we look forward to? Caveats are immediately in order. First, as Toynbee himself insisted, prediction is always hazardous and speculative. Second, in Toynbee's scheme, "breakdown" was not the final phase of a society; it was a prelude to what he called "disintegration," and the overall process could take centuries.[226] Moreover, Toynbee emphasized that these developments are not deterministic in nature;[227] so it was not inevitable that the failures and fragmentation that constitute breakdown would necessarily culminate in disintegration.[228] Kuhn likewise maintained that a paradigm can sometimes enter a condition of crisis but then recover; he also believed that even an embattled paradigm is likely to persist until some more satisfactory alternative develops.[229]

So on these understandings it would seem that prospects for what might result from the current crisis of the secular paradigm would turn on whether adequate responses to the challenges can be devised and, even if they cannot be, on whether better alternative paradigms emerge.[230] There is little point in speculating here about those eventualities.[231] But one prominent and less radical possibility has already been obliquely suggested and might be noticed more directly.

Earlier we noted a possible important distinction—though one that tends to pass overlooked in much theorizing and jurisprudence today—between a *secular paradigm of legitimacy* and a *paradigm of secular legitimacy*. As we saw, the latter kind of paradigm—or the idea that in

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226 *Cf.* Sorokin, *supra* note 45, at 183 ("[S]ome of [Toynbee's] civilizations which, according to his scheme, ought to have been dead a long time ago, after their breakdown, lived centuries, even thousands of years, and are still alive and very much so.").

227 RECONSIDERATIONS, *supra* note 45, at 518 ("Patterns in the course of human affairs are not predetermined or inevitable, and that therefore past patterns afford no basis for predictions about the future.").

228 A STUDY OF HISTORY, *supra* note 222, at 254, 403; *see also*, RECONSIDERATIONS, *supra* note 45, at 534 ("Western Civilization may or may not be in decline in our time; contemporary Westerners are not in a position to diagnose their own civilization's prospects.").

229 *See supra* notes 34–43 and accompanying text.

230 While acknowledging that the secularism is in a state of crisis, Rajeev Bhargava argues that "we still do not possess a reasonable, moral, and ethical alternative to secularism. Secularism remains our best bet to help us deal with ever-deepening religious diversity . . . ." Bhargava, *supra* note 8, at 92. Bhargava accordingly proposes that secularism be "rehabilitated" by relaxing the commitments of Western versions of secularism in favor of practices and understandings from other countries such as India. *Id.*

231 *Cf.* Casanova, *supra* note 186, at 281 ("But it is futile to try to prophesy the possible forms and contents of such postsecular social imaginaries.").

order to be legitimate governments must confine themselves to the secular—seems to be a more recent development. Moreover, it is that more recent construal of the secular paradigm that is the primary source and locus of the difficulties considered in this Essay. In the United States, religious citizens often object to the idea that their religious beliefs must be excluded from political deliberations,[232] or that government cannot affirm religious ideas such as the Ten Commandments[233] or the words "one nation under God" in the Pledge of Allegiance.[234] They may resent the elimination of prayers from high school graduation ceremonies.[235] Conversely, except with respect to the claim that governments and politics should be purely secular, there seems to be little opposition to the more affirmative ideas that constitute what we have called the modern "secular paradigm of legitimacy"—democracy, the rule of law, and individual rights. Thus, religious citizens in the United States today typically do not oppose the democratic idea that government should be based on the consent of the governed.[236] Indeed, they may resent judicial impositions of secularism on the public sphere in part precisely because such impositions can seem authoritarian, undemocratic, and contrary to the consent of the governed.[237]

Basic assumptions about law and government may of course be different in, say, the Islamic world. Even so, speaking from an evi-

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232   *Cf.* Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 656 (1999) ("The principle of secular rationale degrades religious persons from the status as of equal citizens.").

233   *See, e.g.*, Linda Greenhouse, *Nine Justices and Ten Commandments*, N.Y. TIMES, August 26, 2010, http://opinionator.blogs.nytimes.com/2010/08/26/nine-justices-and-ten-commandments/?ref=opinion&nl=opinion&emc=tya1 (lamenting that after a 2005 Supreme Court decision forbidding a Ten Commandments display in Kentucky courthouses, efforts to erect such displays in public buildings around the country have "gone viral").

234   *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (reversing a much criticized Ninth Circuit decision declaring the words constitutionally invalid in public school exercises).

235   *See, e.g.*, ROBERT S. ALLEY, WITHOUT A PRAYER 140–43 (1996).

236   While challenging this consensus, Robert Kraynak acknowledges that "[a]lmost all churches and theologians now believe that the form of government most compatible with the Christian religion is democracy. . . . For Christians in the contemporary world, it seems obvious that the Gospel message of care for the poor and universal love requires democratic equality and freedom in one fashion or another." ROBERT P. KRAYNAK, CHRISTIAN FAITH AND MODERN DEMOCRACY 1 (2001).

237   See, for example, the various essays and opinions collected in END OF DEMOCRACY? (Richard John Neuhaus ed., 1997).

dently secular perspective and to "secularists under duress"[238] in some areas of the globe, Ran Hirschl proposes the relinquishment of secularist commitments together with vigorous affirmation of a different feature typical of modern notions of legitimacy—namely, *constitutionalism.* Hirschl argues that along with the increasing involvement of religion in politics through much of the world a commitment to constitutionalism has grown as well, and these two developments can complement and check each other. "Just as in constitutional democracy the 'constitutional' keeps in check the 'democracy' aspect, so does the 'constitutional' in constitutional theocracy limit the spread of theocratic governance in settings prone to such expansion."[239] Constitutionalism need not be secular; on the contrary, a variety of relations to religion is compatible with constitutional government.[240] Secularists would naturally prefer that government be secular, of course, but in many contexts that possibility may be unavailable. "As support for theocratic governance continues to grow [in some parts of the world], religious establishment becomes an increasingly attractive, lesser-evil solution for secularists, statists, modernists, and other religion-taming interests . . . ."[241]

One possibility, in short, is that it will turn out upon reconsideration that governmental secularism is not as essential to the paradigm of legitimacy that has developed since the Reformation and Enlightenment as many jurists and theorists have supposed. Although ideas of popular sovereignty and constitutionalism are *in themselves* secular, not theological, they need not mandate that *governments* must be secular.

In sum, it may be that what is in a state of "crisis" and "breakdown" is not so much the secular paradigm of legitimacy, exactly, but instead an unnecessary imposition upon, or extension of, that paradigm—namely, the paradigm of secular legitimacy. Theorists have already begun seriously to rethink the connection between religion and democracy in contemplating prospects for democracy in countries like Iraq.[242] The connection might be reconsidered as well for places like . . . America.

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238   HIRSCHL, *supra* note 147, at 50.
239   *Id.* at 13.
240   *Id.* at 26–40.
241   *Id.* at 19.
242   *See, e.g.*, NOAH FELDMAN, AFTER JIHAD (2003) (discussing whether democracy can flourish today in lands where Islam prevails).