

NATIONALISM, POPULISM, RELIGION, AND THE QUEST TO REFRAME FUNDAMENTAL RIGHTS

Susanna Mancini[†] and Michel Rosenfeld[‡]

TABLE OF CONTENTS

INTRODUCTION	464
I. NATIONALIST AND POPULIST APPROPRIATIONS OF RELIGION FOR THEIR ANTI- PLURALIST AIMS	469
A. <i>The “Repoliticization” of Religion</i>	471
B. <i>Nationalism and Religion</i>	476
C. <i>Populism and Religion</i>	490
II. THE DYNAMIC BETWEEN INSTITUTIONAL AND IDEOLOGICAL SECULARISM	494
III. ILLIBERAL AND ANTI-PLURALIST RECOURSES TO RELIGION CONGRUENT WITH NATIONALIST AND POPULIST RESHAPING OF FUNDAMENTAL RIGHTS	499

[†] Full Professor and Chair of Comparative Constitutional Law, The University of Bologna School of Law.

[‡] University Professor of Law and Comparative Democracy and Sydney L. Robins Professor of Human Rights, Benjamin N. Cardozo School of Law, Yeshiva University. The co-authors dedicate this article to the memory of Norman Dorsen with whom they had the honor and privilege of collaborating on many fronts over a long period of time. In particular, the co-authors are grateful for Dorsen’s leadership and inspiring contribution in the International Association of Constitutional Law, in which Susanna Mancini is currently a Vice President and Michel Rosenfeld a President Emeritus; and for his wisdom, dedication and unwavering commitment as our casebook co-author in the field of comparative constitutional law. In addition, Michel Rosenfeld is profoundly indebted to Dorsen for having been enlisted in the co-founding, and a decade of co-directing the International Journal of Constitutional Law, which rose from a timely, creative and ambitious idea conceived by Dorsen to a worldwide recognition as the leading journal in its field. The co-authors also wish to thank Carl Anthony, Cardozo School of Law J.D. 2020 and Sabarish Suresh, Cardozo School of Law J.S.D. Candidate 2022, for their excellent research contributions to this article.

A. <i>Reshaping Secularism as Religious Majoritarianism: The Case of India</i>	500
B. <i>Reinforcing the Privilege of Christian Majorities in Europe Through the Imposition of Religious Symbols in State Schools</i>	505
C. <i>Natural Law, Natural Rights, and the Religion of the Nation</i>	512
D. <i>An (Un)holy Alliance: The Russian Orthodox Church's Partnership with the State to Subvert the International Human Rights Regime</i>	524
CONCLUSION	533

INTRODUCTION

One of the central pillars of liberal constitutional democracy originating in the Enlightenment has been adherence to institutional secularism.¹ Institutional secularism, which is well exemplified by the U.S. Constitution's First Amendment Establishment and Free Exercise Clauses, requires sufficient separation between state and religion to allow for a pluralistic polity in which various religious and non-religious conceptions of the good can be accommodated in ways that sustain peaceful coexistence. In the American case, the Establishment Clause prohibits the state from embracing any particular religion or from preferring any of them over others.² At the same time, the Free Exercise Clause guarantees freedom of belief and the right of every person to practice the religion of her choice.³ Other liberal constitutional democracies draw the line somewhat differently, with some like France requiring stricter separation between the state and religion,⁴ and others like the United Kingdom enshrining an official

¹ See Michel Rosenfeld, *Constitutionalism and Secularism: A Western Account*, in HANDBOOK ON CONSTITUTIONS AND RELIGION 22 (Susanna Mancini ed., 2020).

² See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1998).

³ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”); *Church of the Lukumi Bablu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993) (“The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause ‘forbids subtle departures from neutrality,’ . . . and ‘covert suppression of particular religious beliefs [.]’ . . .” (citations omitted)).

⁴ See *Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État* [Law of December 9, 1905 concerning the Separation of Church and State], art. 1–2, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 9, 1905 (ensuring both the freedom of conscience and exercise of religion while also holding that the non-

state religion that does not operate in any way that curtails the religious liberties of the religiously-diverse citizenry.⁵ The key to maintaining institutional secularism consists of the state and the public sphere operating, in substance, independently from religion, while in the private sphere affording a maximum opportunity for religions to thrive and to coexist. Consistent with the values of the Enlightenment, ideally religions should be completely depoliticized and removed from the public sphere in exchange for being guaranteed a privileged status within the private sphere.⁶

Significantly, in the last decades of the twentieth century, there has been a dramatic “repoliticization” of religion in various parts of the world,⁷ and this has led to sustained and systematic attacks on institutional secularism. This new phenomenon has been complex and variegated. In some cases, such as in that of Iran, a secular regime has been replaced by a theocratic one;⁸ in others, such as that concerning

recognition, payment, or subsidization of any religion by the state and the abolition of public religious establishments).

⁵ The U.K. codified its constitutional protection for freedom of religious belief and manifestation of that belief in 1998 with the incorporation of the European Convention on Human Rights, Article 9 of which upholds the freedom of thought, conscience, and religion. Human Rights Act 1998, c. 42, § 1(3), sch. 1, incorporating the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221. In fact, the only legal, constitutional vestiges of preference for the Church of England relate to monarchical succession. See Act of Settlement 1700, 12 & 13 Will 3 c. 2 (officially declaring the Crown as joined “in Communion with the Church of England”); Accession Declaration Act 1910, 10 Edw. 7 & 1 Geo. 5 c. 29 (providing the coronation oath, where the monarch must swear that she is a “faithful Protestant” and will act to “secure the Protestant succession to the Throne”).

⁶ To the extent that freedom of religion is a fundamental constitutional right, religious belief should be inviolable and religious practice protected from majoritarian policies unless the relevant state meets the high thresholds allowing for limited and targeted limitations of fundamental rights under the constitution. See, e.g., European Convention for Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, art. 9(2), 213 U.N.T.S. 221 [hereinafter ECHR] (“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”); *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

⁷ See JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 3–6 (1994).

⁸ Greg Bruno, *Religion and Politics in Iran*, COUNCIL ON FOREIGN REL. (June 19, 2008), <https://www.cfr.org/backgroundunder/religion-and-politics-iran> [<https://perma.cc/LD5B-6WDL>]; Farhad Rezaei, *Theocracy vs. Democracy in Iran: A New Round in an Old Conflict*, ATLANTIC COUNCIL (July 3, 2017), <https://www.atlanticcouncil.org/blogs/iransource/theocracy-vs-democracy-in-iran-a-new-round-in-an-old-conflict> [<https://perma.cc/YQ3Z-H2W9>]; see also *Report from Iran*, CARNEGIE COUNCIL (Nov. 15, 2011), <https://www.carnegiecouncil.org/studio/>

Protestant fundamentalists in the United States, religious fervor has motivated strong political organization and deployment with notable policy successes but without thus far altering the basic constitutional order.⁹ The repoliticization of religion has taken different forms, ranging from radically progressive to radically conservative ones. One can think of the political praxis of Latin American Liberation Theologians, who integrated Catholic teaching and Marxism to advocate for social justice and the liberation of oppressed people.¹⁰ In many recent cases, however, one of the most salient and far-reaching consequences of the repoliticization of religion is its starkly anti-pluralist thrust, which is perhaps best exemplified by contemporary instances of religious nationalism and of religious populism. In both of these cases, what is crucial is not whether or not there is a significant or widespread commitment to religious belief or dogma, but instead the use of religion as the basis for forging identitarian bonds that are strongly exclusionary of those cast as the “Other.” In religious nationalism, national identity is defined above all by belonging to a single (usually majoritarian) religion—whether in terms of religious belief and practice or in terms of embracing the cultural mainstays associated with the religion in question. Moreover, this religious belonging implies that commitment to other (usually minoritarian) religions is contrary to, or erosive for, the unity or coherence of the imagined community bound together by its own distinct national identity. For example, by insisting that the United States be regarded above all as a Christian nation, one can readily convey to non-Christians that they do not belong or that at best they should be merely tolerated.¹¹ On the other hand, religious populism—as all populism—

multimedia/20111115-report-from-iran [https://perma.cc/UYX8-FUHV] (describing Iran as “a polity which has a democratic structure,” but differs from the Western experience in that “[i]t is a democracy based on Islamic rationality”).

⁹ Clyde Haberman, *Religion and Right-Wing Politics: How Evangelicals Shaped Elections*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/us/religion-politics-evangelicals.html> [https://perma.cc/MZ3Z-MCS5]; Michael Lipka, *Half of Americans Say Bible Should Influence U.S. Laws, Including 28% Who Favor It over the Will of the People*, PEW RES. CTR.: FACT TANK (Apr. 13, 2020) <https://pewrsr.ch/3eeiiZI> [https://perma.cc/GLF2-Y38L].

¹⁰ Robert J. Araujo, S.J., *Political Theory and Liberation Theology: The Intersection of Unger and Gutiérrez*, 11 J.L. & RELIGION 63, 63, 66–67 (1994–1995).

¹¹ See *Town of Greece v. Galloway*, 572 U.S. 565, 632–33 (2014) (Kagan, J., dissenting) (stating that a municipality’s invocation of Christian prayer during town hall meetings “infuse[d] a participatory government body with one (and only one) faith, so that month in and month out,

consists in projecting a part as the whole when circumscribing “the people.”¹² Accordingly, the people may be the ordinary citizens led by their charismatic leader against the “elites;” the native born versus the immigrants; a particular ethnic group against all others; and, in the case of religious populism, those belonging to one religion as opposed to all those who belong to other religions. Thus, for example, in a contemporary populist regime, such as that of Prime Minister Orbán in Hungary, references to the country’s Christian heritage are directed against liberal elites cast as enemies of the Hungarian people because, among other reasons, they are accused of favoring and facilitating Muslim immigration into the country.¹³

To the extent that nationalism and populism resort to religion to establish markers of inclusion and of exclusion, they seek to stand institutional secularism associated with liberal constitutionalism on its head. However, religious nationalism and populism do not thereby necessarily altogether cast secularism away. Instead, they tend to reposition secularism by replacing *institutional* secularism with *ideological* secularism.¹⁴ Said differently, they portray the latter as a conception of the good among many, and nationalism and populism weigh in, for or against it, to better suit their anti-pluralist inclusionary

the citizens appearing before it become partly defined by their creed—as those who share, and those who do not, the community’s majority religious belief”).

¹² DANIELE ALBERTAZZI & DUNCAN MCDONNELL, *POPULISTS IN POWER 5* (2015) (defining populism as “[a] thin-centred ideology which pits a virtuous and homogeneous people against a set of elites and dangerous ‘others’ who are together depicted as depriving (or attempting to deprive) the sovereign people of their rights, values, prosperity, identity and voice”).

¹³ Péter Krekó, Bulcsú Hunyadi, & Patrik Szicherle, *Anti-Muslim Populism in Hungary: From the Margins to the Mainstream*, BROOKINGS (July 24, 2019), <https://www.brookings.edu/research/anti-muslim-populism-in-hungary-from-the-margins-to-the-mainstream> [<https://perma.cc/B5QX-M6XJ>]; see also *id.* (“In [the Hungarian far-right’s] view, the European Union and some member states force the dictatorship of liberal values on their citizens and other countries. Hence, according to their narrative, the ‘cosmopolitan’ elites in Brussels and some other capitals (e.g., in Berlin) dictate just like Moscow did back in the communist era.” (citing *Orbán a rezsicökkentést hasonlítja március 15-éhez*, ORIGO (Mar. 15, 2014), <https://www.origo.hu/itthon/20140315-orban-viktor-unnepi-beszede-2014-marcius-15-en.html> [<https://perma.cc/69SY-TJZN>])).

¹⁴ For a more extensive discussion of the contrast between institutional and ideological secularism, see Michel Rosenfeld, *Recasting Secularism as One Conception of the Good Among Many in a Post-Secular Constitutional Polity*, in *CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL* 79–109 (Susanna Mancini & Michel Rosenfeld eds., 2014).

and exclusionary agendas.¹⁵ Furthermore, religious nationalist and populist polities, though illiberal and anti-pluralist, are often committed to honoring human rights and fundamental constitutional rights in somewhat different and mostly more limited ways. Illiberal religious nationalist and populist polities tend to reinterpret those rights, however, in ways that suit their anti-pluralist agendas. Thus, for instance, Christian nationalists or populists may reinterpret freedom of religion rights in ways that disadvantage or exclude the rights asserted by Muslims.¹⁶ Also, polities dominated by certain religious traditionalists may promote versions of fundamental rights that may well exacerbate discrimination against women and sexual minorities.¹⁷

The purpose of this article is to examine systematically how nationalism and populism have recourse to the interplay between religion and secularism in its various forms for purposes of mounting a formidable challenge against liberal constitutionalism and one of its principal pillars, institutional secularism. As a consequence of the challenge in question, religious nationalism and religious populism seek to upend institutional secularism and to replace it with ideological secularism, which they may either attack as a foe to the religion they incorporate,¹⁸ or to invoke ideological secularism as an ally against a religion they target for exclusion or demotion.¹⁹ Furthermore, the article will also address how religious nationalism and religious populism aim at recasting fundamental rights to conform with their anti-pluralist aims.

This Article is divided into three parts. Part I concentrates on how nationalism and populism can, and have, appropriated religion to erect an illiberal and anti-pluralist constitutional architecture and discourse. Part II examines how religious nationalism and religious populism undermine institutional secularism and how they seek to replace it with, and make use of, ideological secularism to further their aims. Finally, Part III undertakes a review of a select number of salient cases and initiatives from various jurisdictions for purposes of illustrating how

¹⁵ See discussion *infra* Part II. Catherine Fieschi, *Muslims and the Secular City: How Right-Wing Populists Shape the French Debate over Islam*, BROOKINGS (Feb. 28, 2020), <https://www.brookings.edu/research/muslims-and-the-secular-city-how-right-wing-populists-shape-the-french-debate-over-islam> [https://perma.cc/7WVB-XLSY].

¹⁶ See *infra* Section III.B.

¹⁷ See *infra* Sections III.C, III.D.

¹⁸ See *infra* Section III.C.

¹⁹ See *infra* Part II.

human rights and fundamental constitutional rights may be reinterpreted to fall in line with the essential dictates of religious nationalism or with those of religious populism.

I. NATIONALIST AND POPULIST APPROPRIATIONS OF RELIGION FOR THEIR ANTI-PLURALIST AIMS

Nationalism and populism are not inherently tied to religion. To the contrary—since the Enlightenment, nationalism has been mainly correlated with secularism. As a consequence of the decline of religiosity among European intellectuals during the nineteenth century, nationalism came to replace religion as the main binding force within a political community.²⁰ The nation as a source of identity, solidarity, and common political purpose may be based on a shared history, ethnicity, culture, or language without any particular religion playing any defining role.²¹ Similarly, populism, with its characteristic embrace of a part of the whole population within the relevant polity as *the* People, need not invoke religion as it sets its divide between those it includes and those it excludes. Some populisms are thus ethnically based²² and others pit the common person against the elites and the expert class.²³ Moreover, even when a

²⁰ See ANTHONY D. SMITH, *THE ETHNIC REVIVAL IN THE MODERN WORLD* (1981).

²¹ See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 12, 22, 197 (rev. ed. 2006) (national identity based on delimiting an imagined community).

²² For example, Hungarian populism, as exemplified by the policy positions of the right-wing governing party Fidesz and the far right-wing party Jobbik, is ethnic in nature. See *MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY]*, ALAPTÖRVÉNY (Fidesz redrafted the Hungarian constitution after taking power in 2010. The current constitution now differentiates between the “Hungarian nation” or “people” and “nationalities living with us . . . [as] constituent parts of the State.”); Carol Schaeffer, *How Hungary Became a Haven for the Alt-Right*, ATLANTIC (May 28, 2017), <https://www.theatlantic.com/international/archive/2017/05/how-hungary-became-a-haven-for-the-alt-right/527178> [https://perma.cc/8ZKD-3D2N] (describing Jobbik’s platform for preserving an ethnically pure state); Geneviève Zubrzycki, “We, the Polish Nation”: *Ethnic and Civic Visions of Nationhood in Post-Communist Constitutional Debates*, 30 *THEORY & SOC’Y* 629, 638 (2001) (stating that “[t]he nation, in Poland, is primarily understood in ethnic terms” and that “the Polish ethno-national identity is based at least partly on religious affiliation”). In countries that are more ethnically homogenous, elites are sometimes declared to be “multicultural ‘ethnic traitors.’” See Ben Stanley, *The Thin Ideology of Populism*, 13 *J. POL. IDEOLOGIES* 95, 104–05 (2008).

²³ JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 10–11 (2016); Duncan McDonnell & Luis Cabrera, *The Right-Wing Populism of India’s Bharatiya Janata Party (and Why Comparativists Should Care)*, 26 *DEMOCRATIZATION* 484 (2019) (discussing who the Bharatiya Janata Party

particular religion may be tied to an instance of nationalism or populism, this may be largely incidental and have little influence on the shaping and execution of the common project within the polity involved. For example, contemporary France is a secular society where a vast majority of the citizenry happens to be Catholic, in contrast to Poland, which widely regards itself as a Catholic nation.²⁴

To better understand the principal characteristics of the type of contemporary religious nationalism and populism that adhere to fundamental human and constitutional rights, while purporting to redefine them, it is necessary to briefly focus on the confluence of key factors that account for the implantation of the phenomenon under consideration. In essence, three developments have converged to bring about the current predicament: the revitalization and “repoliticization” of religion;²⁵ the resurgence of nationalism after the fall of the Soviet Union;²⁶ and further recourse to nationalism coupled with the widespread embrace of populism as a reaction against transnational governance regarded as a major threat against democratic rule and

(“BJP”), or Indian People’s Party, determines to be “elites”); Devesh Kapur, *Modi’s India Is Aspirational, Assertive—and Anti-Elite*, WASH. POST (May 29, 2019, 12:46 PM), <https://www.washingtonpost.com/opinions/2019/05/29/modis-india-is-aspirational-assertive-anti-elite> [https://perma.cc/QAB3-8XPN] (discussing a significant portion of the BJP’s support coming from stark class divides between lesser-educated and non-English proficient rural populations and richer, more-educated urban populations).

²⁴ Fieschi, *supra* note 15 (describing “the political space occupied by French Catholics . . . no political party can afford to put Catholicism at the heart of its political program—or in fact go anywhere near it, because this speaks to only roughly five percent of the electorate.”); Rob Schmitz, *As an Election Nears in Poland, Church and State Are a Popular Combination*, NAT’L PUB. RADIO (Oct. 12, 2019, 8:01 AM), <https://www.npr.org/2019/10/12/768537341/as-an-election-nears-in-poland-church-and-state-are-a-popular-combination> [https://perma.cc/M55E-S9DY] (reporting that nine in ten Poles are Catholic and quoting both former Polish Prime Minister, Jarosław Kaczyński, who stated “Christianity is part of our national identity, the [Catholic] Church was and is the preacher and holder of the only commonly held system of values in Poland,” and a layperson, who stated “[b]eing Polish means religion, God, children and family” (first alteration in original)).

²⁵ CASANOVA, *supra* note 7 at 5–6.

²⁶ Mark R. Beissinger, *Nationalism and the Collapse of the Soviet Union*, 18 CONTEMP. EUR. HIST. 331 (2009); Randall D. Law, *Soviet Nationalism Is Still Driving Russian Politics*, ATLANTIC (Dec. 22, 2011), <https://www.theatlantic.com/international/archive/2011/12/soviet-nationalism-is-still-driving-russian-politics/250391> [https://perma.cc/GL54-L8ER].

against globalization with its propensity to exacerbate huge inequalities in wealth and to threaten traditional values and cultural bonds.²⁷

A. *The “Repoliticization” of Religion*

The ideal of institutional secularism is difficult to approximate even under the most favorable circumstances but becomes increasingly problematic as the modern welfare state encroaches on what traditionally pertained to the private sphere. A primary example is provided by education. So long as education remains exclusively within the private sphere, parents should have no trouble integrating the religion of their choice within the schooling of their children. Once the state becomes the principal educator through its public school system, however, both inclusion of religion within the curriculum and its exclusion from it are apt to raise serious doubts about institutional secularism’s potential for neutrality.²⁸ Although the blurring of the boundaries between the public and private spheres certainly increases the burdens on institutional secularism, what poses by far the greatest threat to the latter’s legitimacy and viability is the major systemic reentry of religion within the political sphere of many different countries throughout the world, starting in the 1980s. This new development consists in the “deprivatization” of religion²⁹ and involves

²⁷ See Wil Arts & Loek Halman, *National Identity in Europe Today: What the People Feel and Think*, 35 INT’L J. SOC. 69, 71 (2005) (“Many European citizens are afraid ‘of being “invaded” by foreign cultures.’ Not only foreign cultures from outside Europe are considered a threat, many Europeans of different nationalities also see the further unification of Europe as posing a danger to the survival of national cultures and identities.” (quoting Alain Touraine, *European Countries in a Post-National Era*, in SOCIAL CHANGE AND POLITICAL TRANSFORMATION 13 (Chris Rootes & Howard Davis eds., 1994))).

²⁸ *Compare* Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (finding reading of Bible verses and reciting of Lord’s prayer by students at public school to violate Establishment Clause), *with* Smith v. Bd. of Sch. Comm’rs, 827 F.2d 684 (11th Cir. 1987), *and* Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985) (finding no violation of Establishment Clause after secular education in public school challenged by fundamentalist Protestant parents as amounting to the unconstitutional teaching of the religion of “secular humanism”). In the latter cases, the courts found no violation of the Establishment Clause, but failed to explain why godless humanism ought not be considered on a metaphysical plane as analogous to the God-fearing worldview propounded by fundamentalist Protestantism.

²⁹ See CASANOVA, *supra* note 7, at 3 (“Religion in the 1980s ‘went public’ . . . [L]eaving its assigned place in the private sphere, [it] had thrust itself into the public arena of moral and political contestation. . . . [Among the developments responsible for this change] were the

two interrelated processes: the “repoliticization of the private religious and moral spheres;” and the “renormativization of the public economic and political spheres.”³⁰ As already noted, in some cases, such as that of Iran, the repoliticization in question has led to the installment of a theocracy where religious law is meant to rule.³¹ Theocracies, even constitutional ones like that in Iran,³² and regimes dominated by fundamentalist religion³³ subsume all governance and rights to religious precepts, institutions, and authorities, hence amounting to a negation of all that liberal constitutionalism calls for. Because of this, theocratic regimes will not be further discussed in this Article as they do not directly bear on the trends and problems examined in what follows. Instead, the focus will be on repoliticized religion that seeks to change the constitution, politics, law, or the interpretation of fundamental rights, but that does not come close to overtaking the polity as the 1979 Iranian Revolution and its Constitution did. Moreover, the repoliticized

Islamic revolution in Iran; the rise of the Solidarity movement in Poland; the role of Catholicism in . . . political conflicts throughout Latin America; and the public reemergence of Protestant fundamentalism as a force in American politics.”).

³⁰ *Id.* at 5–6.

³¹ The Preamble to the 1979 Iranian Constitution, as amended in 1989, states in part: “In the view of Islam, government . . . represents . . . the fulfillment of the political ideal of a people who bear a common faith and common outlook, taking an organized form in order to initiate the process of intellectual and ideological evolution towards the final goal, i.e., movement towards Allah. Our nation, in the course of its revolutionary developments, has cleansed itself of the dust and impurities that accumulated during the past and purged itself of foreign ideological influences, returning to authentic intellectual standpoints and world-view of Islam. It now intends to establish an ideal and model society on the basis of Islamic norms. The mission of the Constitution is . . . to create conditions conducive to the development of man in accordance with the noble and universal values of Islam.” ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran).

³² Article 12 of the Iranian Constitution provides, in relevant part, “The official religion of Iran is Islam and the Twelver Ja’fari school [in *usul al-Din* and *fiqh*], and this principle will remain eternally immutable.” *Id.* at art. 12. In spite of the all-encompassing place of Islam in Iran’s public sphere, Article 13 of its Constitution does afford protection to a small number of religious minorities: “Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.” *Id.* at art. 13.

³³ Religious fundamentalists consider their religion as the repository of absolute truth and insist that the state be ruled exclusively pursuant to the dictates of the true religion. See Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 203, 224 (Ciaran Cronin & Pablo De Greiff eds., 1999) (1996).

religion in question may take several different forms. This includes the one propagated by the type of fundamentalist Protestantism politically active in the United States that was referred to above, to the extent that it operates and seeks changes within the existing constitutional order. Viewed from a moral, political, and constitutional standpoint, American Protestant fundamentalism does not openly seek to overthrow or replace the constitutional or political order within the United States. Instead, it endeavors to fight for laws and to advocate for constitutional interpretations that accord with its religious creeds and its understanding of biblically prescribed morality.³⁴ Thus, for example, Protestant fundamentalists have used laws in ways that undermine women's equality,³⁵ and fought for laws and constitutional decisions against rights to abortion,³⁶ and against the rights of sexual minorities.³⁷

³⁴ See, e.g., *Mission and Work*, NAT'L ASSOC. OF EVANGELICALS, <https://www.nae.net/about-nae/mission-and-work> [<https://perma.cc/B2EU-9MKB>] (noting the importance of government in advancing the organization's faith-based goals and discussing its engagement with government in regard to supporting religious liberty, pro-life stances, and strengthening marriages, inter alia).

³⁵ See *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014).

³⁶ See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2065 (discussing the entrance of Protestant evangelical engagement in antiabortion politics as part of a "broad-based attack on cultural developments evangelical critics termed 'secular humanism'"); Dalia Fahmy, *With Religion-Related Rulings on the Horizon, U.S. Christians See Supreme Court Favorably*, PEW RES. CTR. (Mar. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/03/03/with-religion-related-rulings-on-the-horizon-u-s-christians-see-supreme-court-favorably/> [<https://perma.cc/LG3V-WQZV>] (noting both that several states have passed bills seeking to ban almost all abortions and that 61% of white evangelical Protestants favor the overturning of *Roe v. Wade* by the U.S. Supreme Court).

³⁷ For example, in the recent *Bostock v. Clayton Cty.* Supreme Court case, there were five different amici curiae briefs filed by Protestant groups arguing that Title VII of the Civil Rights Act of 1964 should not be read to encompass "sexual orientation" within the statute's prohibition against discrimination on the basis of "sex," which had previously given employers a proverbial green light as a matter of federal law to terminate employment solely on the basis of being LGBTQ. See Brief for the Nat'l Assoc. of Evangelicals et al. as Amici Curiae Supporting Respondents, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (No. 17-1618) (joined by other non-Protestant religious groups as well); Brief for the Inst. for Faith & Family and the Christian Family Coalition as Amici Curiae Supporting Respondents, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (No. 17-1618); Brief for the Billy Graham Evangelistic Assoc. et al. as Amici Curiae Supporting Respondents, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (No. 17-1618); Brief for the Council of Christian Colls. & Univs. as Amici Curiae Supporting Respondents, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (No. 17-1618); Brief for Advocates for Faith & Freedom as Amici Curiae Supporting Respondents, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (No. 17-1618). The Supreme Court ultimately held that the Title VII prohibition of employer discrimination on the basis of sexual orientation was in fact discrimination on the basis of "sex." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

More generally, Protestant fundamentalists have attacked both institutional and ideological secularism which they have characterized as the “religion” of “secular humanism.”³⁸

Another brand of repoliticized religion, championed in the name of Catholicism by Pope Benedict XVI, relies on the assumption that faith coincides with the dictates of universal reason, which are embodied in natural law, and that accordingly its normative prescriptions can be equally derived from faith or from reason.³⁹ In this light, the “right use of reason in legal arguments leads to the same conclusions as theological reasoning.”⁴⁰ Moreover, consistent with this, in sharp contrast to Catholic-sanctioned universally-valid law and morality, ideological secularism amounts to a “dictatorship of relativism.”⁴¹ This perceived relativism is linked to a multitude of evils that conspire to deprive human life of all meaning and to reduce human beings to depraved hedonism or to mere calculating mutual exploitation.⁴² Repoliticized religion can also be enlisted to erode institutional secularism without necessarily fostering intolerance against ideological secularism. In this context, religion is to conspicuously reenter the public sphere as inextricably linked to the culture of the polity or as an essential attribute of such culture. Examples of religion figuring as culture include requiring the display of the crucifix in public school classrooms in constitutionally secular Italy,⁴³ and inclusion of the Christian crèche, or nativity scene, in a

³⁸ See sources cited *supra* note 28.

³⁹ See Marta Cartabia & Andrea Simoncini, *A Journey with Benedict XVI through the Spirit of Constitutionalism*, in POPE BENEDICT XVI'S LEGAL THOUGHT: A DIALOGUE ON THE FOUNDATION OF LAW 3–9 (Marta Cartabia & Andrea Simoncini eds., 2015) (referring to the Pope's view that catholic faith and reason coincide in affirming universally valid morality and law). This papal assertion is, however, by no means widely shared in the legal academy. See, e.g., Christopher McCrudden, *Benedict's Legacy: Human Rights, Human Dignity, and the Possibility of Dialogue*, in *id.* at 165–6 (pointing to “major tensions” between the Catholic Church and several secular human rights positions, including those on abortion).

⁴⁰ Julieta Lemaitre, *By Reason Alone: Catholicism, Constitutions, and Sex in the Americas*, 10 INT'L J. CONST. L. 493, 493 (2012).

⁴¹ Cardinal Joseph Ratzinger, Homily for the Mass “*Pro Eligendo Romano Pontifice*” at St. Peter's Basilica (Apr. 18, 2005), http://www.vatican.va/gpII/documents/homily-pro-eligendo-pontifice_20050418_en.html [<https://perma.cc/CS3Z-NRTC>].

⁴² See e.g., Pope John Paul II, Encyclical Letter *Evangelium Vitae* at para. 22–3 (Mar. 25, 1995), http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html [<https://perma.cc/C48H-93LE>].

⁴³ *Lautsi v. Italy* (No. 30814/06), 2011-III Eur. Ct. H.R. (G.C) 63, ¶¶93-94.

holiday municipal grounds display in the United States.⁴⁴ The culturalization of religion need not be on its face hostile to ideological secularism. It does, however, challenge the principle of separation between Church and State. The premise that states must recognize that the national religious inheritance is not just one among other denominations, but rather an element of civic cohesion that cements identitarian bonds of national solidarity. What follows is that the historical national religion should enjoy a preferential treatment, while other denominations should at best be tolerated. This is likely to set the premises for the marginalization of non-Christian cultures, thus lowering the protection of religious freedom.⁴⁵ It is also quite plausible that in the course of religion being spread as culture throughout the public sphere, it could also become enlisted in a campaign against a purely secular worldview.⁴⁶ In addition, religion can become essential in the very definition of peoplehood. This is the case in Israel, where Judaism, the religion of a single people, has become the national religion as the country's Declaration of Independence proclaimed it to be a "Jewish and democratic" state.⁴⁷ Significantly, Israeli Jews are divided over whether the country ought to officially adopt the religion and the laws it prescribes to rule over the Jewish population as the ultra-Orthodox would wish;⁴⁸ or whether Judaism should be incorporated

⁴⁴ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

⁴⁵ Susanna Mancini, *The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism*, in CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 111, 134 (Susanna Mancini & Michel Rosenfeld eds., 2014).

⁴⁶ See, e.g., Maria Abi-Habib & Sameer Yasir, *As Modi Pushes Hindu Agenda, a Secular India Fights Back*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/world/asia/india-muslims-citizenship.html> [<https://perma.cc/LAGY-7HDC>]; *The Erosion of Secular India*, ECONOMIST (Feb. 4, 2020), <https://www.economist.com/the-economist-explains/2020/02/04/the-erosion-of-secular-india> [<https://perma.cc/3544-Q58G>].

⁴⁷ See Gila Stopler, *Constitutionalism and Religion in a Jewish and Democratic State*, in HANDBOOK ON CONSTITUTIONS AND RELIGION 209 (Susanna Mancini ed., 2020). In 2018, the Israeli Parliament adopted a controversial Basic Law—which has constitutional effect—designating Israel a "Jewish Nation-State," even though 20% of the country's citizenry is not Jewish. Basic Law: Israel—The Nation State of the Jewish People, 2018 (Isr.); Susanna Mancini, *Introduction*, in HANDBOOK ON CONSTITUTIONS AND RELIGION 10 (Susanna Mancini ed., 2020).

⁴⁸ Israel has adopted the *Millet* system to regulate the relationship between the state and religion. Rosenfeld, *supra* note 1, at 36. Under that system, each of the religions within the country regulate their own religious and personal affairs, such as marriage and divorce. Israeli Muslims and Christians, therefore, each regulate their own religious personal, and communal affairs. Accordingly, the ultra-Orthodox Jews' view is that the state should impose *halacha*,

mainly as culture and tradition while maintaining Western secular and democratic laws and values as Israel's secular Jews prefer.⁴⁹

In sum, the repoliticization of religion can take many forms, involve different kinds of religion, and make use of the religion at stake in different ways. These range from imposing religious prescriptions through law and public morality—including some version or selection of the religious norms in question, depending on the objectives of the proponents involved with the propagation of religion in the political arena—to the use of religion for purely identitarian purposes as a vehicle of cultural inclusion and/or exclusion in relation to the polity's political and public spheres. With these nuances in mind, we now turn to a brief examination of contemporary nationalism and populism, which will better enable us to understand how the latter are apt to appeal to religion and to make use of it in those cases in which they take on a religious bent.

B. *Nationalism and Religion*

Nationalism, in Ernest Gellner's notable definition, is the "principle[] which holds that the political and the national unit should be congruent."⁵⁰ Moreover, in the context of modern constitutional democracies, it is the people that gives itself a constitution meant to be implemented within a nation-state.⁵¹ Although in the vernacular the "people" and the "nation" are often invoked interchangeably, the two are conceptually distinct even when their respective referents are fully coextensive. The people is the aggregate of persons that gives itself a constitution, by which it agrees to be governed within a specified state.⁵²

Jewish religious law, on all of Israel's Jewish population. See PEW RES. CTR., ISRAEL'S RELIGIOUSLY-DIVIDED SOCIETY 14 (2016), <https://www.pewforum.org/wp-content/uploads/sites/7/2016/03/Israel-Survey-Full-Report.pdf> [<https://perma.cc/VL3E-ZHUV>] (reporting 89% of surveyed Haredim believe *halacha* should be given preference over democratic ideals, and 86% of Haredim would favor *halacha* being made the official law of the land for Jews).

⁴⁹ PEW RES. CTR., ISRAEL'S RELIGIOUSLY-DIVIDED SOCIETY, *supra* note 48 at 6, 14 (reporting that 89% of secular Jews (Hilonim) believe that democratic principles should take preference over religious law).

⁵⁰ ERNEST GELLNER, NATIONS AND NATIONALISM 1 (1983).

⁵¹ The Preamble of the U.S. Constitution much celebrated "We the People" is thus an emblematic iteration of similar pronouncements throughout the world. See U.S. CONST. pmb.

⁵² It is often asserted that in a democracy, the people engage in self-government. See, e.g., JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762). As the focus here is on the state's role

The nation, on the other hand, in the words of Benedict Anderson, is an imagined community⁵³ that, as mentioned above, is meant to provide a common identity, a common heritage, and a common basis for the maintenance of bonds of solidarity.⁵⁴ Unlike a family or a tribe that functions collectively on the basis of individual acquaintance and personal relationships, the modern nation-state creates a political order in which members of the polity primarily relate to one another as strangers.⁵⁵ Accordingly, what binds together these strangers is an imagined construct around which they can all rally. Nationalism is thus intrinsically linked to national identity and consists in affirmation and internalization of, as well as commitment to, the latter.

Nationalism has both an inclusive and an exclusive facet. Each nation has a distinct national identity, and solidarity within one's own nation requires subscribing to the relevant identity to the exclusion of all others.⁵⁶ There is, however, an important distinction between inclusive and inclusionary, on the one hand, and exclusive and exclusionary, on the other. For example, to the extent that American national identity requires adherence to, and respect for, the U.S. Constitution, it is inclusionary. It leaves the door open for any legal immigrant to eventually obtain citizenship and to become absorbed into the American nation by swearing allegiance to the country's Constitution.⁵⁷ In contrast, a national identity that relies exclusively on

in the governing of the people, whether the state acting *for* the people is also run *by* the people need not be addressed any further.

⁵³ ANDERSON, *supra* note 21, at 5–6.

⁵⁴ *See id.* at 5–7.

⁵⁵ *Id.* at 6.

⁵⁶ Although various national identities must remain distinct from one another, this does not mean that composite or overlapping elements cannot successfully coexist. For example, Irish-Americans and Italian-Americans can certainly continue partaking in important elements of the national identity of their respective countries of origin without being less loyal to the United States. Nevertheless, in certain circumstances, solidarity to one national identity must exclude given shared allegiances. Thus, to the extent that German and Japanese nationalism fueled those countries' war against the United States during the Second World War, German-Americans and Japanese-Americans could not legitimately at once be loyal to the political community of their country of citizenship and to that of their country of origin.

⁵⁷ 8 U.S.C. § 1448(a) (2018) (stating that a public ceremony for naturalization must include "an oath to support the Constitution"); 8 U.S.C. § 1101(a)(22) (2018) (defining a U.S. "national" as a citizen of the United States or a non-citizen that "owes personal allegiance to the United States"); 8 C.F.R. § 337.1(a) (2020) (providing the oath of allegiance for naturalization processes,

ethnic belonging, such that members of any other ethnic group cannot be included within the nation, no matter how long or deeply rooted they may be within the relevant polity, would plainly be thoroughly exclusionary.⁵⁸

Religious nationalism seems at first paradoxical given that, as noted above, nationalism has historically been associated with secularism.⁵⁹ In the wake of the Enlightenment, secularism dethroned religion for purposes of delimiting and sustaining the relevant community that could be marshalled into a political unit. Accordingly, the nation as an imagined community that provides a common identity, shared values, and a congruent set of objectives, loomed as well-poised to fill the growing void stemming from the disenchantment with religion.⁶⁰ Although secular nationalism may flourish by occupying a

which states, “I hereby declare . . . that I will support and defend the Constitution and laws of the United States of America . . .”).

⁵⁸ Compare the Preamble to the 1989 amended version of the 1949 Hungarian Constitution, *MAGYARORSZÁG ALAPTÖRVÉNYE* [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY pmb. (amended 1989) (which speaks in the name of “the Republic of Hungary”), with the Preamble to the 2011 Hungarian Constitution, *MAGYARORSZÁG ALAPTÖRVÉNYE* [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY pmb. (2011) (“We, the Members of the Hungarian Nation . . . promise to preserve the intellectual and spiritual unity of our nation torn apart in the storms of the last century.”). The latter promise alludes to the dismantling of the vast territory inhabited by Hungarian nationals within the Austro-Hungarian Empire at the end of the First World War upon the adoption of the Treaty of Trianon in 1920. This treaty has been regarded as a national tragedy within Hungary. See Alasdair Sandford & Ádám Magyar, *Trianon Trauma: Why Is the Peace Treaty Signed 100 Years Ago Seen as a National Tragedy for Hungary?*, EURONEWS (June 4, 2020), <https://www.euronews.com/2020/06/04/trianon-trauma-why-is-the-peace-treaty-signed-100-years-ago-seen-as-a-national-tragedy> [https://perma.cc/856W-9BYY]. Additionally, certain Hungarian politicians have toyed with the idea of incorporating ethnic Hungarians living in bordering contemporary countries—such as Romania, Serbia, and Slovakia—into a “greater Hungary.” See Marcel Gascón Barberá & Anja Vladisavljevic, *Orban’s “Greater Hungary” Map Creates Waves in Neighborhood*, BALKAN INSIGHT (May 7, 2020, 3:55 PM), <https://balkaninsight.com/2020/05/07/orbans-greater-hungary-map-creates-waves-in-neighborhood> [https://perma.cc/9YVY-VJQJ]. As for non-Hungarian nationals within Hungary, the 2011 preamble states: “The nationalities living with us form part of the Hungarian political community and are constituent parts of the State.” *MAGYARORSZÁG ALAPTÖRVÉNYE* [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY pmb. (2011). Accordingly, non-ethnic Hungarians are excluded from the Hungarian nation, but included in their country’s political sphere and count as citizens of the Hungarian state.

⁵⁹ See *supra* Part I.

⁶⁰ See Anna Grzymala-Busse, *Religious Nationalism and Religious Influence*, in OXFORD RES. ENCYC.: POLITICS (Mar. 2019), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-813?rskey=27IUve&result=2> [https://perma.cc/3JSR-BRLK] (stating that this belief derives from the tradition of Emile

space left open by the retreat of religion, it is nonetheless unlikely that this would result in a complete purge of religion from its former sphere of influence. Indeed, for all its mythical and imaginary dimensions, national identity must incorporate—albeit in an idealized, transformed, or redeployed iteration⁶¹—aspects of the history, tradition, and culture of those it seeks to rally into a political unit. Almost inevitably, within the history, tradition, and culture at stake, aspects of the relevant religion will remain embedded. Examples abound, extending from Sunday being the day of rest in the most secular of traditionally Christian countries to Weber’s linking the “spirit” of capitalism to Protestant ethics.⁶² However, religious symbols, elements, or fragments that are embedded in secular national identity typically figure as displaced, detached, or reframed in relation to their position in their religion of origin. And because of this, the religious-based materials in question may be regarded on a par with non-religious components of the pertinent imagined community. Thus, for example, Vercingetorix, the pre-Christian Gallic king, is as much part of French national identity as is Joan of Arc, who was reported to have been directed by God to lead the French in battle against the English on the way to the decisive victory that put an end to the Hundred Years’ War.⁶³ In short, in the context of the present analysis, the mere fact that an element or aspect of a secular national identity is issued from religion ought not

Durkheim). There is no consensus among scholars over whether modern nationalism was originally grounded in religion or in a secular movement away from religion. See, e.g., ROGERS BRUBAKER, *NATIONALISM REFRAMED: NATIONHOOD AND THE NATIONAL QUESTION IN THE NEW EUROPE* 39 (1996) (arguing that national and religious projects were consolidated in European countries starting in the sixteenth century). For present purposes, however, it suffices to establish the nineteenth century’s largely secular nationalism as our starting point.

⁶¹ See MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY* 45–64 (2010) (discussing the role of negation, metaphor, and metonymy in the construction of constitutional identity, which is distinct from, but analogous in its elaboration to, national identity).

⁶² See generally MAX WEBER, *THE PROTESTANT ETHIC AND THE “SPIRIT” OF CAPITALISM AND OTHER WRITINGS* (Peter Baehr & Gordon C. Wells trans., 2002).

⁶³ See Michael Dietler, “*Our Ancestors the Gauls*”: *Archaeology, Ethnic Nationalism, and the Manipulation of Celtic Identity in Modern Europe*, 96 *AM. ANTHROPOLOGIST* 584, 584, 593 (1994) (demonstrating various and ideologically-opposed French politicians and political movements—such as François Mitterand, Giscard d’Estaing, Jacques Chirac, and the Front National—utilizing imagery of Vercingetorix at Bibracte, and also noting a contemporary survey of French schoolchildren between the ages of eight to eleven, in which Vercingetorix was ranked three places ahead of Joan of Arc).

weigh against any otherwise-reasoned conclusion that a particular imagined community is representative of secular nationalism.

Twentieth and twenty-first century religious nationalism emerged because of disappointment with secular nationalism, combined with the repoliticization of religion and the spread of fundamentalism.⁶⁴ Instances of contemporary religious nationalism have arisen in the context of various religions, including Christianity, Islam, Judaism, and Hinduism.⁶⁵ From a functional standpoint, the *religious* component of

⁶⁴ See Grzymala-Busse, *supra* note 60 (citing these arguments from MARK JUERGENSMEYER, *THE NEW COLD WAR? RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE* (2d ed. 1994)). See generally FOUAD AJAMI, *THE ARAB PREDICAMENT: ARAB POLITICAL THOUGHT AND PRACTICE SINCE 1967* (2d ed. 1993) (recounting the trajectory from the failure of secular Arab nationalism to the religious Islamist nationalism propounded by the Muslim Brotherhood).

⁶⁵ In countries with majority Christian populations, nationalism is often framed predominantly in terms of Christian religious, symbolic, and cultural identity. Regarding U.S.-based Christian nationalism, see Andrew L. Whitehead & Christopher P. Scheitle, *We the (Christian) People: Christianity and American Identity from 1996 to 2014*, 5(2) *SOCIAL CURRENTS* 157, 161–62, 165 (2018) (demonstrating a large wave of Christian nationalism in the United States in 2004 and that heightened sentiments of Christian symbolic boundary in the United States are usually part of a larger wave of exclusionary attitudes); MICHELLE GOLDBERG, *KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM* (2006) (discussing the rise in bellicose Christian fundamentalism in the United States). In the case of Poland, see Rafał Pankowski & Marcin Kormak, *Radical Nationalism in Poland: From Theory to Practice*, in *RIGHT-WING EXTREMISM IN EUROPE* 157, 157–58 (Ralf Melzer & Sebastian Serafin eds., 2013) (quoting the “father of modern Polish nationalism,” Roman Dmowski, who states that, “Catholicism is not an addition to Polishness . . . but . . . in large measure it defines its essence. Any attempt to separate Catholicism from Polishness . . . threatens to destroy the nation’s very essence.”). Within Islam, Islamic nationalist movements historically rose in opposition to secular nationalist movements in the Arab world and other Muslim-majority countries in the twentieth century, with an eye to center national governments either around the pan-Islamist idea of the *ummah* or to inject Islamic theology into the constitutional and legal structures of government. See Sayed Khatab, *Arabism and Islamism in Sayyid Qutb’s Thought on Nationalism*, 94 *MUSLIM WORLD* 217, 219–21 (2004) (discussing the belief of the intellectual founder of the Egyptian Muslim Brotherhood, Sayyid Qutb, that secular nationalism was regional and *jahiliyyah* (i.e., government related to power of humans over other humans rather than submission to God), and that the Islamic view of a nation was centered on that of one nation (*ummah wahidah*) bound together by belief). Relating to Jewish religious nationalism in Israel, see *Far Right Lawmaker Calls for Israel to Follow Biblical Law*, *HAARETZ* (June 3, 2019), <https://www.haaretz.com/israel-news/elections/.premium-far-right-israeli-lawmaker-calls-for-israel-to-operate-according-to-biblical-law-1.7316580> [<https://perma.cc/MB3A-RXCQ>] (Bezalel Smotrich, a member of the far-right Orthodox party Tkuma, and Knesset member for the right-wing alliance Yamina, stated, “I want the State of Israel to operate according to the Torah in the long run. That’s how it should be, it’s a Jewish state”); Allison Kaplan Sommer, *Meet the Israeli Political Party Waging a Holy War Against the LGBTQ Community*, *HAARETZ* (Aug. 30, 2019), <https://www.haaretz.com/israel-news/elections/.premium-meet-the-israeli-political-party-waging-a-holy-war-against-the->

religious nationalism differs, at times quite substantially, from one setting to the next. Nevertheless, in a key departure from secular nationalism, religious nationalism imagines and incorporates religion (or any of the latter's attributes it highlights) qua religion. For example, certain Christian conservatives envision the United States as a Christian nation founded by God and granted a privileged position in the world's history,⁶⁶ and some Christian denominations have even portrayed the United States as the New Jerusalem.⁶⁷ Although this particular brand of American nationalism is highly contested, if it were to become predominant, it would require combatting pluralism and regarding secularists as sacrilegious and therefore, in essence, un-American.⁶⁸

How religion fits within religious nationalism—and what it calls for in terms of the constitution, the laws, policies, civil society, and the state—varies in terms of both the religion (or one among many

lgbtq-community-1.7767670?v=1595949392571 [https://perma.cc/E9GS-FT22] (stating that the ultimate goal of the intellectual leader of the Noam party, Rabbi Tzvi Tau, is “that Israel should be an ultra-Orthodox state”); Matthew Wagner, *Religious Affairs: Who's Afraid of a Halachic State?*, JERUSALEM POST (Dec. 10, 2009), <https://www.jpost.com/Features/Religious-Affairs-Whos-afraid-of-a-halachic-state> [https://perma.cc/358S-J75L] (reporting on then-Justice Minister Yaakov Neeman's remark that “step by step, Torah law will become the binding law in the State of Israel. We have to reinstate the traditions of our forefathers, the teaching of the rabbis of the ages”). In India, the Hindutva, or Hindu-nationalist, movement has been championed by current Prime Minister Narendra Modi and is notorious for being violently anti-Islam. See Duncan McDonnell & Luis Cabrera, *The Right-Wing Populism of India's Bharatiya Janata Party (and Why Comparativists Should Care)*, 26 DEMOCRATIZATION 484, 485 (explaining that the Bharatiya Janata Party (BJP) translates “Hindutva” as “cultural nationalism,” or “public culture for a united Hindu people”). See generally MARK JUERGENSMEYER, GLOBAL REBELLION: RELIGIOUS CHALLENGES TO THE SECULAR STATE, FROM CHRISTIAN MILITIAS TO AL QAEDA (2008) (providing a general survey of the rise in religious nationalism around the globe).

⁶⁶ See GOLDBERG, *supra* note 65.

⁶⁷ The scripture of the Church of Jesus Christ of Latter-Day Saints holds, as a tenant of its faith, the belief in the “literal gathering of Israel and in the restoration of the Ten Tribes; that Zion (the New Jerusalem) will be built upon the American continent.” *Articles of Faith of the Church of Jesus Christ of Latter-Day Saints* 1:10.

⁶⁸ See William Barr, U.S. Att'y Gen., Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame (Oct. 11, 2019) <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics> [https://perma.cc/C3WZ-C8GU] (asserting that the Framers of the Constitution believed that “religion was indispensable to sustaining our free system of government,” and that “militant secularists” are a threat to the United States's “Judeo-Christian” values); see also Assaf Sharon, *Counter-Secularism and Religious Revival*, RESET DIALOGUES ON CIVILIZATIONS (Oct. 31, 2017), <https://www.resetdoc.org/story/counter-secularism-religious-revival> [https://perma.cc/473U-GX4C] (remarking that American conservatives often dismiss secular urban liberals as un-American).

interpretations of that religion) and of those among its particular elements that figure in the pertinent national identity and in the life of the corresponding polity. Where the religion itself becomes all-encompassing, as is the case in theocracies, then, as pointed out above in discussing contemporary Iran,⁶⁹ it does not allow for any rights to interpret that religion unless those interpretations happen to be sanctioned by the national religion as understood by the clergy in power. Where religious nationalism incorporates the ruling religion in a less comprehensive or less unified manner, however, religion is bound to have an important impact on the polity, but how much and how contested that impact might be will depend on several variables. The case of Israel is instructive in this regard. Israel is a Jewish nation-state, but what “Jewish” means to Israelis is a hotly disputed matter. Ultra-Orthodox Jews want the country ruled according to religious law, the *halacha*, and argue that since *halacha* provides a comprehensive legal system, the country does not need a constitution.⁷⁰ Secular Israeli Jews, in contrast, are likely to acknowledge the biblical origin of the connection between Jews and the land of Israel, celebrate certain religious holidays like Passover marking the exit of the Jews from slavery in Ancient Egypt in a more nationalistic and cultural, rather than religious, way, but otherwise aspire to enjoy the way of life and the rights typical of Western liberal constitutional democracies.⁷¹ At present, the conflict among these two conceptions of “Jewish” is unresolved, but some of the country’s laws, such as the 1961 law against farming pork or various laws against public transportation on the Sabbath,⁷² only make sense in reference to the religious proscriptions of

⁶⁹ See *supra* notes 32–33 and accompanying text.

⁷⁰ See NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ, SUSANNE BAER, SUSANNA MANCINI., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 60–61 (3d ed. 2016); see also PEW RES. CTR., *supra* note 48, at 14.

⁷¹ See PEW RES. CTR., *ISRAEL’S DANGEROUSLY DIVIDED SOCIETY*, *supra* note 48, at 14–15 (reporting that 90% of Hilonim, or secular Jews, oppose the imposition of *halacha* as the state’s law, 94% oppose shutting down all public transit for Sabbath observance, and 93% oppose gender segregation on public transit).

⁷² Pig-Raising Prohibition Law, 5722–1962, 16 LSI 93 (1961–62) (Isr.) (exempting certain communities in the northern part of the country with a large Christian-Arab population; Shuki Friedman, *The Shabbat Wars: A Guide for the Perplexed on the ‘Status Quo’ . . . and a Possible Solution*, ISR. DEMOCRACY INST. (Mar. 2, 2017), <https://en.idi.org.il/articles/14015> [<https://perma.cc/5XWY-QRP4>] (discussing a 1991 Transportation Ordinance prohibiting “[operation of] public bus routes on rest days”); but see Oliver Holmes & Quique Kierszenbaum, “A Blessed

Judaism. In addition to the religion component in religious nationalism being often contested and imprecisely delimited, there are many cases in which the content of a religious prescription internalized within the operating national identity happens to be virtually indistinguishable from a similar prescription issued from a secular standpoint. Thus, for example, Catholic social solidarity principles commanding concern for the welfare of the poor correspond to those espoused by secular liberal egalitarians.⁷³ In the latter case, whether the asserted principle issues from a religious rather than a secular perspective depends on context. In a Catholic nation, relating the welfare of the poor to the teachings of Jesus would seem much more natural than in a secular nation with a vast array of different religious traditions.⁷⁴

In examining what fuels religious nationalism and what it projects unto the polity it targets, a basic distinction can be drawn between cases where religion seeks to frame nationalism and cases where nationalism aims to appropriate, and in some measure, incorporate religion. U.S. Christian fundamentalists, Islamist adherents to the Muslim Brotherhood, and Ultra-Orthodox Jews in Israel all draw on their religiosity and their paramount commitment to religious observance and practice in their struggle to get their respective nation to embrace their religion, its precepts and values, and to impose them on the polity as a whole.⁷⁵ In contrast, in a country such as communist Poland in the

Initiativ": *Secular Israel Rejoices over Sabbath Buses*, THE GUARDIAN (Dec. 28, 2019), <https://www.theguardian.com/cities/2019/dec/28/secular-israel-sabbath-buses> [https://perma.cc/D2A2-NN8R].

⁷³ See JOHN RAWLS, *POLITICAL LIBERALISM: EXPANDED EDITION* 451–52 (2d ed. 2005).

⁷⁴ In this regard, it is instructive to refer to the statement made by U.S. Catholic Bishops against the Reagan Administration's policies adversely impacting the welfare of the poor. See, e.g., U.S. CONF. CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* (1986), https://www.usccb.org/upload/economic_justice_for_all.pdf [https://perma.cc/XM7E-XVV4]. The Bishops were clearly weighing in as proponents of moral norms prescribed by Catholicism and not as representatives of the American political left that also decried Reagan's policies adversely affecting the social welfare net previously set in place to protect the poor.

⁷⁵ For Christianity in the United States, see PEW RES. CTR., *WHITE EVANGELICALS SEE TRUMP AS FIGHTING FOR THEIR BELIEFS, THOUGH MANY HAVE MIXED FEELINGS ABOUT HIS PERSONAL CONDUCT* 16 (2020), https://www.pewforum.org/wp-content/uploads/sites/7/2020/03/PF.03.12.20_religion.politics_report.pdf [https://perma.cc/ZLF5-JVWJ] (showing that, amongst White Evangelical Protestants, 58% want the Bible to influence U.S. law "a great deal," and 31% saying the Bible should influence it "some"; this figure is 47% and 29%, respectively, for Black Protestants. Additionally, 68% of White Protestants believe that the Bible should have more influence than the will of the people if the two conflict; that figure is 50% for Black Protestants);

1980s, it was nationalism standing against anti-nationalist and anti-religious Soviet domination that enlisted the country's Catholic heritage to forge a path towards an autonomous post-communist future.⁷⁶ Whereas contemporary Poland harbors a large majority of practicing Catholics,⁷⁷ several other former communist countries—such as Russia,

Paul Rosenberg, *Secrets of the Extreme Religious Right: Inside the Frightening World of Christian Reconstructionism*, SALON (July 31, 2015, 11:26 PM), https://www.salon.com/2015/07/31/secrets_of_the_extreme_religious_right_inside_the_frightening_world_of_christian_reconstructionism [<https://perma.cc/R7HX-6XHS>] (describing Christian Reconstructionism as a pre-conceptualist, post-millennialist, and theonomist movement driven to “reconstruct[] the Kingdom of God as it was intended to be”); Michelle Goldberg, *Dominionism: Michele Bachmann and Rick Perry’s Dangerous Bond*, DAILY BEAST (Aug. 14, 2011, 10:51 PM), <https://www.thedailybeast.com/dominionism-michele-bachmann-and-rick-perrys-dangerous-religious-bond?ref=scroll> [<https://perma.cc/38EC-PNVR>] (describing the Dominionism movement as one that seeks to have Christians lead national governments and sees “rule by non-Christians [as] a sort of sacrilege . . . [because] ‘Christians have an obligation . . . a holy responsibility to reclaim the land for Jesus Christ—to have dominion in civil structures, just as in every other aspect of life and godliness’”). For Islam, see, e.g., OLIVIER GUITTA, CTR. EUR. STUD., POLICY BRIEF: MUSLIM BROTHERHOOD PARTIES IN THE MIDDLE EAST AND NORTH AFRICA (MENA) REGION (2010), https://martenscentre.eu/sites/default/files/publication-files/muslim_brotherhood_parties_1.pdf [<https://perma.cc/YF83-TRGK>] (the Egyptian Brotherhood’s Reform Initiative proposed that only a Muslim man may become President of Egypt, effectively barring women and Coptic Christians from the presidency); cf. Asli Aydintasbas, *Erdogan the Nationalist v. Erdogan the Islamist*, CARAVAN (Dec. 13, 2018), <https://www.hoover.org/research/erdogan-nationalist-vs-erdogan-islamist> [<https://perma.cc/CF5C-73RM>] (describing Erdogan’s “promotion of ‘imam-hatip’ schools within the Turkish education system . . . [to create] a ‘pious generation’” as indicative of a specific brand of Islamism that is geared more to inject philo-AKP conservatism into Turkish society, and to act as an accessory to the nation state, rather than a challenge to it). In Israel there is a highly-publicized debate over how appropriate consideration of religious law should be in daily public life. See Moshe Feiglin, *The Real Coercion in Israel*, ISR. NAT’L NEWS, <http://www.israelnationalnews.com/Articles/Article.aspx/11066> [<https://perma.cc/J9LE-TP55>] (ex-Knesset member stating that “[t]he entire Israeli reality has become a platform for the multi-faceted tyranny of the secular minority . . . over the traditional/religious/ultra-Orthodox majority”); Ruth Margalit, *How the Religious Right Transformed Israeli Education*, NEW YORKER (Aug. 23, 2019), <https://www.newyorker.com/news/letter-from-jerusalem/how-the-religious-right-transformed-israeli-education> [<https://perma.cc/L8FX-QE6F>] (discussing “*hadata*,” or “religionization,” as a phenomenon of the Netanyahu era over areas of civic life that had normally enjoyed a clear division between religion and state, such as public education).

⁷⁶ Zubrzycki, *supra* note 22, at 638–40.

⁷⁷ CO ŁĄCZY POLAKÓW Z PARAFIĄ? [WHAT CONNECTS POLES WITH THE PARISH?], CENTRUM BADANIA OPINII SPOŁECZNEJ [CBOS] [CTR. PUB. OPINION RES.] 2, 3 (2005) (study reporting that 58% of respondents take part in Catholic religious practices at least once a week and state that they follow the instructions of the Catholic Church).

Bulgaria, and Hungary—emerge as clear examples of nationalism appropriating religion in polities lacking widespread religious fervor.⁷⁸

It seems obvious that issues of religiosity, religious practice, and observance are much more likely to arise when religion turns to nationalism than when nationalism embraces religion. From our perspective, what is crucial is to focus on the distinct ways in which religious nationalism promotes anti-pluralistic and exclusionary agendas. Even where religion is sought to be nationalized, the result would not have to be necessarily exclusionary. Indeed, for a nationalized religion to not be exclusionary it would have to be, on the whole, compatible with freedom *of* and *from* religion for all within the polity. Nevertheless, in a large number of cases, the nationalist turn to religion goes hand-in-hand with an anti-pluralist agenda. Typically, from the internal perspective of a particular religion, that religion is the true and the right one (or at least truer and more right). Accordingly, by turning to religion qua religion as opposed to religion qua (one among many components of) culture, the nationalist is better positioned to tout her appropriated religion as hierarchically privileged and beyond discussion.⁷⁹

Besides religiosity, religious practice, and observance, some of the other most salient aspects of religion that have been incorporated into nationalism include religious morals, religious values and ways of life, religious customs, religious symbols, and various religious cultural attributes. Both the religious who turn to nationalism and the nationalists who appeal to religion are bound to be selective. Short of a theocracy, the former would have to aim for the most possible situation within constitutional limitations. Thus, if fundamentalist Protestants

⁷⁸ See Grzymala-Busse, *supra* note 60 (referring to Russia and Bulgaria); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY pmb. (2011) (“We recognise the role of Christianity in preserving nationhood.”); PEW RES. CTR., RELIGIOUS BELIEF AND NATIONAL BELONGING IN CENTRAL AND EASTERN EUROPE 70 (2017), <https://assets.pewresearch.org/wp-content/uploads/sites/11/2017/05/15120244/CEUP-FULL-REPORT.pdf> [<https://perma.cc/3GNC-LRDN>] (reporting only 9% of Hungarians attending weekly religious services, 26% attending monthly or yearly, and 64% attending seldom or never).

⁷⁹ This suggested contrast between religious tradition and cultural tradition is usefully illustrated by reference to the U.S. constitutional jurisprudence on sexual orientation. Compare *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (Burger, C.J. concurring), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (Burger, C.J. concurring) (invoking Judeo-Christian condemnation of homosexual sex), *with Lawrence*, 539 U.S. at 57172 (2003) (viewing same-sex intimacy between two consenting adults as belonging within the same evolving long-held tradition originally focused on the heterosexual married couple).

became the political majority in the United States while lacking the means to amend the U.S. Constitution, they could enact part, but not all, of their agenda on their way to their version of a Christian America. Because of the freedom of speech and freedom of religion rights enshrined in the First Amendment, the fundamentalists would thus have to tolerate views and religious beliefs and practices that their religion might instruct them to ban. On the other hand, the nationalists who turn to religion are most likely to be selective in their appropriations as some aspects of religion would bolster their nationalist aims while others would be indifferent or even at times counterproductive. For example, a nationalist with libertarian capitalist and patriarchal tendencies may turn to Catholicism to nationalize his campaign against abortion and immigration to bolster the traditional patriarchal family while systematically ignoring Catholic social welfare principles.

Although both kinds of religious nationalism may have to be selective to adapt to political realities, they are otherwise likely to differ. The religious who turn to nationalism would most logically seem prompted to exercise selectivity consistent with their religion's demands. Thus, they may prioritize what is more important within their religion over what might be less so. For example, a religion that prescribes an absolute ban on abortion while deeming contraception as sinful, but lesser evil, might well endorse a national law that criminalizes abortion but affords legal protection to contraception. In marked contrast, the nationalists who seek to incorporate religion are most likely to choose religious morals or symbols or cultural mainstays and to appropriate within each of these those elements that better fit within their nationalistic vision and that are most likely to advance its aims. In other words, nationalists who appeal to religion are prone to being opportunistic.

This kind of opportunism can be briefly illustrated by reference to Hungary's official embrace of Christianity as put forth in the Preamble of its 2011 Constitution, in spite of it being among the least religious countries in present-day Europe.⁸⁰ The Preamble's first proclamation in

⁸⁰ "Church attendance is pretty low in Hungary According to the latest study, 'Beliefs about God across Time and Countries' by Tom W. Smith (University of Chicago), only 9.6% of the population has a strong belief in God as opposed to 35% in the United States and 25.8% in Ireland. Hungary is closer to Great Britain, Sweden, and the Czech Republic as far as religious devotion is concerned. At the same time the percentage of atheists is relatively high: 23.1%."

the name of the Hungarian nation states: “We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago.”⁸¹ To this, the Preamble adds that “[w]e recognize the role of Christianity in preserving nationhood” and that “we honour the Holy Crown, which embodies the constitutional continuity of Hungary’s statehood and the unity of the nation. We do not recognize the suspension of our historical constitution due to foreign occupations.”⁸² Three salient points emerge from the above-quoted passages: the connection between Hungary and Christian Europe, Hungary as a Christian nation, and a millennial Christian constitutional history interrupted by foreign occupations that are nullified within the ambit of the nationally-embraced imagined community. Two of those interruptions are crucial for understanding how Christianity figures in present-day Hungarian nationalism. The first of these is the Ottoman Empire’s conquest and occupation of Hungary from 1541 until 1699,⁸³ while the second is Hungary’s communist regime under Soviet control from 1949 until 1989, marked by the adoption of Hungary’s 1949 Constitution, which was almost a mirror image of its Soviet counterpart.⁸⁴ Whereas the idea of a Christian Europe is a transnational one and one that Orbán’s Hungary shares with Poland,⁸⁵ it also has an internal nationalistic dimension with an exclusionary focus in linking the Ottoman occupation with contemporary anti-Muslim animus. In countering and harshly treating Syrian refugees who were seeking entry into Hungary,

Church and State in Hungary, HUNGARIAN SPECTRUM (Apr. 21, 2012), <https://hungarianspectrum.org/2012/04/21/church-and-state-in-hungary> [https://perma.cc/2VPW-GZZY].

⁸¹ MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY pmb. (2011).

⁸² *Id.*

⁸³ Celestine Bohlen, *Glimpsing Hungary’s Ottoman Past*, N.Y. TIMES (Mar. 10, 1991), <https://www.nytimes.com/1991/03/10/travel/glimpsing-hungary-s-ottoman-past.html> [https://perma.cc/5Q29-76KC].

⁸⁴ William Sólyom-Fekete, *Hungary*, in THE CONSTITUTIONS OF THE COMMUNIST WORLD 191, 192 (William B. Simons ed., 1980) (describing the 1949 Constitution as “a slavish imitation of the Soviet-type constitutions”).

⁸⁵ Daniel Khalili-Tari, *Hungarian Prime Minister Viktor Orbán Vows to Create “Christian Homeland” on Eve of Election*, INDEPENDENT (Apr. 7, 2018, 11:10 PM), <https://www.independent.co.uk/news/world/europe/hungary-general-election-viktor-orban-latest-christianity-nationalism-muslims-migrants-europe-racism-a8293836.html> [https://perma.cc/S3JW-UVYR].

Orban explicitly referred to the Ottoman invasion to justify systematic exclusion of Muslims.⁸⁶ Moreover, Orban's harsh anti-refugee stance was not only avowedly anti-Muslim, but also self-consciously defended as pro-Christian. As one commentator put it, "Orban's embrace of Christian nationalism is a relatively recent turn for a once-avowed atheist. But it is in keeping with Hungary's political present, where critics decry Orban's mixture of strong-man demagoguery and xenophobic rhetoric."⁸⁷ To this must be added Orban's appeal to Christian values in support of his campaign against Western secular liberalism and cosmopolitanism, which he has personalized by demonizing George Soros, an American philanthropist who happens to be a Jewish Holocaust survivor of Hungarian origin.⁸⁸

Matteo Salvini, the former Italian Defense Minister and leader of the right-wing, xenophobic League party, provides another telling example of the mobilization of the majority religion in the service of an anti-pluralist agenda. Arguing for harsh anti-immigration measures, Salvini has systematically portrayed himself as the last bastion of Christianity against the "Islamization of the West."⁸⁹ Ironically, in doing so Salvini has been directly challenging the Church's social doctrine and the Pope's strong and well-publicized humanitarian stance vis-à-vis migrants.⁹⁰ The Italian Conference of Bishops has repeatedly accused him of instrumentally using religion to pursue an openly un-

⁸⁶ See Ishaan Tharoor, *Hungary's Orban Invokes Ottoman Invasion to Justify Keeping Refugees Out*, WASH. POST (Sept. 4, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/09/04/hungarys-orban-invokes-ottoman-invasion-to-justify-keeping-refugees-out> [<https://perma.cc/4L54-QUMT>].

⁸⁷ *Id.*

⁸⁸ Franklin Foer, *Viktor Orban's War on Intellect*, ATLANTIC (June 2019), <https://www.theatlantic.com/magazine/archive/2019/06/george-soros-viktor-orban-ceu/588070> [<https://perma.cc/TX76-AFNW>].

⁸⁹ *Salvini alla guerra santa: "Sto con Trump perché difende i valori cristiani,"* GLOBALIST (Jan. 4, 2020), <https://www.globalist.it/politics/2020/01/04/salvini-alla-guerra-santa-sto-con-trump-perche-difende-i-valori-cristiani-2051196.html> [<https://perma.cc/GD7R-YHH9>].

⁹⁰ Gerard O'Connell, *Pope Francis Reminds Christians that Migrants and Refugees Should Be Welcomed Around the World*, AMERICA (Sept. 29, 2019), <https://www.americamagazine.org/faith/2019/09/29/pope-francis-reminds-christians-migrants-and-refugees-should-be-welcomed-around> [<https://perma.cc/33LU-8NVM>]; Leonardo Salutati, *Immigrazione: Cosa dice la dottrina della Chiesa?*, TOSCANA OGGI (Sept. 2, 2018), <https://www.toscanaoggi.it/Rubriche/Risponde-il-teologo/Immigrazione-cosa-dice-la-dottrina-della-Chiesa> [<https://perma.cc/TY2G-Y59Y>].

Catholic agenda.⁹¹ Salvini, a self-proclaimed devout Catholic despite openly ignoring Catholic teachings in his personal life, has not only consistently exhibited Catholic religious symbols—such as crucifixes and rosaries—during political rallies, but also associated religion with his political victories.⁹² Thus, for example, after the approval by the Italian Parliament of one of the harshest anti-immigration measures adopted upon his initiative, he tweeted his thanks to the Virgin Mary.⁹³ And, after his party's success in the European elections of 2019, he reiterated his thanks to “the immaculate heart of Mary,” for “helping Italy and Europe to find again hope, pride, roots, jobs and security.”⁹⁴

Nationalism can unify a political community by cementing strong bonds of solidarity fueled by intense emotional sentiments leading to patriotic fervor. Patriotism, like nationalism, can be inclusionary or exclusionary, and both can be intensified and further consolidated by linking themselves with religion and religious elements. As discussed above, not all linkages between nationalism and religion are alike. For our purposes, the combinations between nationalism and religion that aim at exclusionary and anti-pluralistic attitudes and policies are the ones that deserve further attention because of their potential in the struggle against secularism and Enlightenment-based understandings of fundamental rights.

Nationalism is conceptually distinct from populism although, as will be further explored below,⁹⁵ the two can figure side by side in animating the public life of contemporary polities. Moreover, populism,

⁹¹ The most influential Catholic press has also systematically denounced Salvini's instrumental use of religion. See “*Vade retro Salvini*”, *La Chiesa reagisce a certi toni sprezzanti*, FAMIGLIA CRISTIANA (July 26, 2018), <https://www.famigliacristiana.it/articolo/migranti-vade-retro-salvini-la-chiesa-reagisce-ai-toni-sprezzanti.aspx> [<https://perma.cc/W45G-QRDM>]; see also Davide Re, *Salvini brandisce il rosario durante il comizio e ribadisce: porti chiusi*, L'AVVENIRE (May 18, 2019), <https://www.avvenire.it/attualita/pagine/salvini-a-milano> [<https://perma.cc/NAH7-TS69>].

⁹² See, e.g., Re, *supra* note 91; Gabriella Cerami, *Salvini trionfa, bacia il rosario e ringrazia la Madonna. Non vuole poltrone ma l'agenda di governo la detta lui*, HUFFPOST https://www.huffingtonpost.it/entry/salvini-vince-non-vuole-poltrone-ma-lagenda-di-governo-la-detta-lui_it_5ceb232be4b00e036570be00 [<https://perma.cc/R6MP-9V9V>].

⁹³ Matteo Salvini (@matteosalvinimi), TWITTER (Aug. 5, 2019, 2:30 PM), <https://twitter.com/matteosalvinimi/status/1158445073278885889> [<https://perma.cc/A5E4-GHMS>].

⁹⁴ *Politica e religione: quando Salvini cerca la benedizione dall'alto*, IL SOLE 24 ORE (Aug. 6, 2019), <https://www.ilsole24ore.com/art/politica-e-religione-quando-salvini-cerca-benedizione-dall-alto-ACoZKUd> [<https://perma.cc/9KQY-GFCU>] (translation by author).

⁹⁵ See *infra* Section I.C.

like nationalism, can link itself to religion. In order to be in a better position to understand how these respective links to religion compare, we now turn to an examination of the conditions that result in a nexus between populism and religion.

C. *Populism and Religion*

Populism, like nationalism, is not inherently religious. Moreover, populism is conceptually distinct from nationalism, although the two can coexist and overlap within the same polity. As already mentioned, populism is characterized by its conception of politics as dedicated to the realization of the will of the people, and by its designation of “the people” as including only a part of the whole within the relevant political unit.⁹⁶ Most often, populism pits the average citizens whom it enshrines as “the people” against the elites whom it casts as the (internal) enemies of the people.⁹⁷ In some instances, these internal enemies are linked with, or aggregated to, external enemies regarded as threatening the well-being or the political agenda of those recognized as the people within their polity.⁹⁸ According to the populist ideal, the people are led by a charismatic leader who embodies their political will and with whom they fully identify.⁹⁹ Together with their leader, the people are supposed to form a moral community with the collective goal of fighting those cast as their enemies in order to redeem the polity in a messianic-type enterprise, leading either to the recovery of some lost golden past or to the removal of extrinsic obstacles that block the path toward an exalted forthcoming destiny.¹⁰⁰

⁹⁶ See *supra* notes 6–13 and accompanying text.

⁹⁷ See MÜLLER, *supra* note 23, at 4, 10–11.

⁹⁸ Rachel Donadio, *The New Populist Playbook*, ATLANTIC (Sept. 5, 2019), <https://www.theatlantic.com/international/archive/2019/09/matteo-salvini-italy-populist-playbook/597298> [<https://perma.cc/9AKF-YCE6>] (reporting that Italy’s Matteo Salvini has accused “elites” like Angela Merkel, Emmanuel Macron, and George Soros of “betraying Europe”); Krekó, Hunyadi, & Szicherle, *supra* note 13, at n.47.

⁹⁹ See Jose Pedro Zúquete, *Populism and Religion*, in THE OXFORD HANDBOOK OF POPULISM 445, 453 (Cristóbal Rovira Kalwasser, Paul Taggart, Paulina Ochoa Espejo, & Pierre Ostiguy eds., 2017).

¹⁰⁰ *Id.*

There is an important distinction between right-wing and left-wing populism.¹⁰¹ The latter typically tracks a class struggle model, figuring the working class as “the people” pitted against political and economic elites cast as the enemies.¹⁰² Accordingly, left-wing populism may well not be nationalistic and it may readily promote transnational coordination between various similarly-situated peoples fighting against various groups regarded as comparatively oppressive elites. Right-wing populism, on the other hand, whether ethnically or religiously grounded, is very likely to be conjoined to nationalism. But even if most right-wing populism tends to be nationalist, not all nationalism need be populist. Indeed, some instances of nationalism may be inclusive of all within the polity, whether they be elites or part of the common citizenry. Thus, for example, French republican nationalism is not populist, as it includes all French citizens as part of an undivided nation within a united polity.¹⁰³ In contrast, in deploying his populist vision of American nationalism, Donald Trump has repeatedly attacked those he portrays as internal enemies. These attacks have included calling most of the U.S. press the “enemies of the people,”¹⁰⁴ and Democrats as “un-American.”¹⁰⁵

The contemporary nexus between populism and religion is essentially twofold and based on a distinction between “politicized religion” and “sacralized politics.”¹⁰⁶ In the first of these situations, the identity, agenda, and objectives of the people are informed by religion. Religion may be invoked to delimit religious insiders versus religious outsiders within the same polity. Thus, on some views, Jews are the people of Israel, Hindus the people of India, and Muslim Malays the

¹⁰¹ See generally Mark Tushnet, *Comparing Right-Wing and Left-Wing Populism*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 639, 639–40 (Mark Graber, Sanford Levinson & Mark Tushnet eds., 2018).

¹⁰² *Id.*, at 640–41.

¹⁰³ See 1958 CONST. art. 1–2 (Fr.).

¹⁰⁴ Donald Trump (@realDonaldTrump), TWITTER (Apr. 5, 2019, 1:41 PM), <https://twitter.com/realDonaldTrump/status/1114221533461790721> [<https://perma.cc/HK2M-E7QY>] (“The press is doing everything within their power to fight the magnificence of the phrase, MAKE AMERICA GREAT AGAIN! . . . They are truly the ENEMY OF THE PEOPLE!”).

¹⁰⁵ Jessica Taylor, *Trump: Democrats “Un-American,” “Treasonous” During State of the Union*, NAT’L PUB. RADIO (Feb. 5, 2018, 4:03 PM), <https://www.npr.org/2018/02/05/583447413/trump-democrats-un-american-treasonous-during-state-of-the-union> [<https://perma.cc/5WLL-CJN6>].

¹⁰⁶ See Zúquete, *supra* note 99, at 445–54.

people of Malaysia.¹⁰⁷ Religion may also be called upon to sever the people who may belong to diverse religions and non-religious ideologies from internal and/or external outsiders identified with a particular religion regarded as inimical to the relevant populist project. The prime example here is that of populists in Europe, who regard Muslims within their borders as well as would-be Muslim immigrants as threatening outsiders.¹⁰⁸ Finally, within a religiously homogeneous polity, religion can be used as a wedge between more conforming religious insiders and less conforming (or non-conforming) internal outsiders. An example of this is provided by the populist rhetoric of a patriarch of the Greek Orthodox Church who linked Greek nationalism to those who adhered to Orthodoxy and Hellenism against those he identified as supporters of the contemporaneous ruling Greek government, which he chastised as being “atheist, modernizing, intellectualist and repressive.”¹⁰⁹

Unlike in politicized religion, where religion infuses politics, in sacralized politics the key feature is an analogy or resemblance between politics and religion.¹¹⁰ In this modern phenomenon, the people represent the good, its enemies personify evil, and the charismatic leader figures as a pastor leading his flock to salvation in a to-be-recovered or yet-to-be reached promised land.¹¹¹ Moreover, although sacralized politics may be practiced much like a religion, it may well operate without reference to religion and without incorporation of any religious symbols or attributes. Hugo Chávez was thus a consummate practitioner of sacralized populism in Venezuela, but his fight was a secular one against those he called the oligarchs, while his inspiration came from the great nineteenth-century liberator of the Americas, Simón Bolívar.¹¹² In other cases, however, sacralized politics can invoke religion or religious elements in support of its political aims. This is the

¹⁰⁷ See Ran Hirschl & Ayelet Shachar, “Religious Talk” in *Narratives of Membership*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* *Supra* note 101, at 515, 517.

¹⁰⁸ *Id.*

¹⁰⁹ See Zúquete, *supra* note 99, at 447.

¹¹⁰ *Id.*, at 451–52.

¹¹¹ *Id.* For a seminal account of modern politics as secularized religion, see generally CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Univ. of Chicago Press, 2005). For present purposes, suffice it to characterize populism as a special kind of sacralized politics.

¹¹² See Zúquete, *supra* note 99, at 458.

case in Orbán's populist and nationalist agenda in Hungary, as he invokes Christianity both against the external outsider enemies, the Muslims, and against the internal enemies, the secular Hungarian elites.¹¹³

Sacralized politics frames populism as a religious pursuit, but to the extent that it is separated from religion itself, as it was in the case of Venezuela under Chavez, it remains peripheral to the principal aims of this Article. Purely secular populism is most likely illiberal and anti-pluralist, but it does not resort to religion itself in its dealings with fundamental rights. In contrast, populism as politicized religion, as well as the subset of populism as sacralized politics that happens to have recourse to religion, does have recourse to religion in its approach to fundamental rights. Moreover, the nature and scope of uses of religion in relation to populism are potentially equivalent to those we have identified in relation to nationalism.¹¹⁴ For present purposes, the principal difference between religion within nationalism and populism is linked to the fact that populism, by its nature, is prone to being more vehemently inclusionary and exclusionary than nationalism. Indeed, all populisms rise against both internal and external enemies, whereas certain nationalisms may be internally inclusive and, for the most part, aspirational. Additionally, although nationalism must nurture the differentiation between nations, it need not treat foreign nations as enemies.

In the end, how inclusionary or exclusionary a particular religious nationalism or religious populism may happen to be can only be assessed when placing the relevant polity in context. We will be in a position to illustrate this in the course of discussing the cases and initiatives that will be the focus of Part III below. Before turning to these particulars, however, it is necessary to briefly examine the dynamic between institutional and ideological secularism, which figures prominently in the illiberal and anti-pluralistic agenda launched by religious nationalists and religious pluralists.

¹¹³ See Krekó, Hunyadi, & Szicherle, *supra* note 13, at n.47.

¹¹⁴ See *supra* Section I.B.

II. THE DYNAMIC BETWEEN INSTITUTIONAL AND IDEOLOGICAL SECULARISM

As indicated above, there is an important distinction between institutional and ideological secularism, which is implicated in the initiatives undertaken by religious nationalism and religious populism against the liberal secular pluralistic constitutional ethos.¹¹⁵ As also mentioned, the initiatives in question tend to invoke ideological secularism against its institutional counterpart.¹¹⁶ Institutional secularism is an ideal that can at best be roughly approximated in its quest to depoliticize religion by expelling it from the public sphere while privileging it in the private sphere.¹¹⁷ The ideal in question is rooted in the Enlightenment distinction between Faith and Reason, with the latter being destined to rule the public sphere to the exclusion of the former.¹¹⁸ Institutional secularism has been deployed in various modern constitutional democracies and has yielded six major different models of regulation of the relation between religion and the state.¹¹⁹ Despite their deep divergences, these six models are unified by their adherence to two crucial common aspirations. These are commitment to religious pluralism (understood as inclusive of non-religious conceptions of the good) and to the related principle that in the affairs of the state and in public policy, no religion shall be considered or treated as the possessor of the truth. In other words, each religion is entitled to comport itself as the sole possessor of the truth within its communal life carried out in the private sphere, whereas no religion is entitled to insist within the public sphere on institutionalization of its own truth, so long as the latter is contested by proponents of other religions and of non-religious perspectives.

In the past decades, Western secularism and its implementations have been subjected to a broad range of critiques from different

¹¹⁵ See *supra* Section I.B.

¹¹⁶ See *supra* Section I.B.

¹¹⁷ See *supra* Introduction, at 464–65.

¹¹⁸ See Rosenfeld, *supra* note 1, at 23–26.

¹¹⁹ The six models are: (1) the militant secularist model; (2) the agnostic secularist model; (3) the confessional secular model; (4) the official state religion with institutionalized tolerance for minority religions model; (5) the Millet-Based Model (*see id.* at 36); and (6) the Contextual Model, which is particularly relevant to India. See generally Rajeev Bhargava, *The Distinctiveness of Indian Secularism*, in *THE FUTURE OF SECULARISM* 20 (T.N. Srinivasan ed., 2007).

perspectives.¹²⁰ In this article, we do not deal with such critiques. We recognize that none of the constitutional models of managing the relationship between religion and the state actually meet the ideal of the Enlightenment, but they nonetheless all remain consistent with the two principal aspirations embedded in that ideal. Accordingly, there is a necessary nexus between liberal constitutionalism and secularism as embodied in the commitment to pluralism through freedom of speech, freedom of religion, and freedom of conscience provisions. In other words, liberal constitutionalism incorporates a minimum of secular substantive values that are necessary—albeit not sufficient—to ensure the coexistence of different religious and non-religious conceptions of the good within a polity. In what follows, we focus on attacks on constitutional secularism in the context of liberal constitutionalism by nationalist and populist actors, who invoke religion to undermine pluralism.

These attacks are essentially twofold. The first of these assaults institutional secularism's very aspiration to neutrality by claiming that any attempt at implementation is bound to yield an anti-religious outcome. As the public sphere expands and becomes more encroaching, and, for example, state-run public education becomes prevalent, the teachings of religion tend to be set aside, suppressed, or countered in increasingly enlarged areas of social and political interaction. This may be regarded as an exercise in neutrality by state actors but experienced as anti-religious by those whose religious commitments or practices are being thwarted. This line of attack has a long history in the United States that includes the famous attempt to ban the teaching of evolutionary theory in public schools in the 1920s,¹²¹ and to require the teaching of creationism alongside evolutionary theory in science classes in the

¹²⁰ See, e.g., TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* 42 (1993) (Talal Asad has put forward the theory that secularism did not in fact expel religion from the public sphere, but rather transformed it “[f]rom . . . a concrete set of practical rules attached to specific processes of power and knowledge,” to “abstracted and universalized” and that the relegation of religion in the private sphere is likely to produce exclusion and discrimination).

¹²¹ David Masci, *The Social and Legal Dimensions of the Evolution Debate in the U.S.*, PEW RES. CTR. (Feb. 4, 2009), <https://www.pewforum.org/2009/02/04/the-social-and-legal-dimensions-of-the-evolution-debate-in-the-us> [<https://perma.cc/UMF7-D64H>]; William Eric Meikle, *Banning Evolution*, 4 *EVOLUTION: EDUC. & OUTREACH* 453, 453–54 (2011).

1980s.¹²² In both these cases, science is treated by certain proponents of Christianity as an integral part of secularist ideology. Moreover, in the case relating to creationism, the distinction between science and religion is sought to be completely blurred. Indeed, by insisting that both creationism and the theory of evolution should be taught side-by-side in science classes,¹²³ the proponents of the teaching of creationism do away with the fact that the theory of evolution is subject to falsification within the strictures of scientific methodology, whereas creationism is dependent on religious revelation or metaphysical speculation. Remarkably, the proponents of teaching creationism in science classes have couched their request in free speech terms,¹²⁴ as if the schools were teaching one scientific theory to the exclusion of another or one ideological set of beliefs to the exclusion of a competing one. From an institutional secularist standpoint, science and religion are distinct subjects that may be taught separately in schools, just as history and literature are. Also, scientific vindication of the theory of evolution is by no means incompatible with metaphysical commitment to creationism or intelligent design. Only if one subscribes to a literal interpretation of the biblical account of God's creation of the world in seven days¹²⁵ does the theory of evolution appear to be in direct contradiction with biblical teachings.

¹²² See Act 590 of 1981, Balanced Treatment for Creation-Science and Evolution-Science Act, ARK. STAT. ANN. § 80-1663, et seq. (1981 Supp.) (*McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (1982)); Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act, LA. REV. STAT. ANN. §§ 17:286.1-7 (1982) (*Edwards v. Aguillard*, 482 U.S. 578 (1987)); Masci, *supra* note 121.

¹²³ See sources cited *supra* note 122.

¹²⁴ See, e.g., Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 529 (1978); Laurie Goodstein, *A Web of Faith, Law and Science in Evolution Suit*, N.Y. TIMES (Sept. 26, 2005), <https://www.nytimes.com/2005/09/26/education/a-web-of-faith-law-and-science-in-evolution-suit.html> [<https://perma.cc/C3NX-S3X3>] (School board officials from Dover, Pennsylvania argue that teaching intelligent design is a free-speech issue. One of the legal representatives for the plaintiffs filing suit against the Dover school board stated that the more recent versions of the textbook in question had merely substituted the word "creationism" for "intelligent design," with the former having a stronger religious connotation).

¹²⁵ Michael Ruse, *Creationism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/archives/win2018/entries/creationism> [<https://perma.cc/KND5-6KJY>] (noting the difference between the belief that a deity is the absolute creator of heaven and earth—which is generally held by Christians, Jews, and Muslims at large—and the belief that the Bible account of creation in Genesis is literally true).

The second major line of attack against institutional secularism is premised on the claim that the latter amounts to a convenient screen for statewide impositions of ideological secularism. One striking example of this kind of attack is provided in lawsuits brought by fundamentalist Protestant parents against their children's public schools, alleging violations of the Establishment Clause.¹²⁶ The parents claimed that the assigned reading in their children's literature class of a text that characterized a tsunami as resulting from the mysterious forces of nature amounted to an unconstitutional state imposition of the religion of "secular humanism."¹²⁷ In the fundamentalist Protestant parents' view, God is the cause behind all natural phenomena, and therefore, the implication that nature acts by itself amounts to a teaching by a religion that contradicts the truth of the transcendent Christian God. In other words, the school may be pretending to comply with institutional secularism as it is embodied in the Establishment Clause, but it is, in fact, imposing the religion of "secular humanism," which coincides with ideological secularism, and which contradicts fundamentalist Protestant theology. Although the courts rejected the parents' arguments and found no violations of the Establishment Clause,¹²⁸ conceptually, in these cases, the distinction between institutional and ideological secularism seems to depend on an interpretive nuance. If the reference to the force of nature in the relevant literary text is taken as being agnostic on the question of whether or not God is behind every natural phenomenon, then the public-school teaching at stake would seem fully consistent with institutional secularism. On the other hand, if the reference in question is understood as implying a negation of divine intervention in natural phenomena, then the text advances an ideological secular perspective. Apparently, for the suing parents, the mere omission of an attribution of divine agency amounted to a denial of a cardinal Christian truth.

The realization that no actual deployment of institutional secularism can achieve complete neutrality or confine the public sphere to a consensus-based rule of reason facilitates attacks against secularism by religious nationalists and populists. From a constitutional standpoint, even if one were to accept that neutrality should be set aside,

¹²⁶ See *Smith v. Board of Comm'rs of Mobile Cty.*, 827 F.2d 684 (11th Cir. 1987); *Grove v. Mead School District*, 753 F.2d 1528 (9th Cir. 1983).

¹²⁷ *Id.* at 1534, 1543–45.

¹²⁸ *Id.* at 1534; *Smith*, 827 F.2d at 695.

those with secular values should enjoy the same freedom of, and from, religion, as all proponents of religious views within society. Consistent with this, democratic constitutionalism should accord all secular and non-secular conceptions of the good, equal rights of accommodation, and inclusion within the polity. In one area, however, secularism should enjoy priority over its religious counterparts. That area encompasses the freedom of scientific research and the teaching of science in state-operated schools. Moreover, the reason for this priority is that, in the bulk of contemporary constitutional democracies, the vast majority of proponents of religious world views rely on scientific research and on the practical applications of that scientific research. Therefore, opposition to science on religious grounds would not defy logic, but would amount to what philosophers call a “performative contradiction.”¹²⁹ A religion that accepts and makes use of science in the areas of health, communication, transportation, etc., engages in a performative contradiction when it seeks to prevent, or to interfere with, the pursuit of science by proponents of other conceptions of the good, such as secularism. In other words, the proponent of the religion that wishes to suppress science in part ought to realize that he cannot have it both ways—e.g., prohibit the teaching of evolutionary theory in public schools while benefiting from the latest medical advances in public hospitals—once he understands that the realm of scientific discovery and application has a unity and integrity of its own and, in a large number of cases, that his own religion requires recourse to some or all available medical means to save or prolong life.¹³⁰ As a consequence of this, secularism’s pro-science and certain religions’

¹²⁹ Martin J. Matustik, *Habermas on Communicative Reason and Performative Contradiction*, 47 *NEW GERMAN CRITIQUE* 143, 146 (1989) (“Performative contradiction occurs in concrete existential contexts of contemporary philosophy whenever one shifts from being engaged in discourse into evading one’s own stance, when what I say is undermined by my saying it.”); Jaakko Hintikka, *Cogito, Ergo Sum: Inference or Performance?*, 71 *PHIL. REV.* 3, 16–17 (Descartes’s famous maxim is not, in and of itself, a logically-true statement, but rather the “the relation of *cogito* to *sum*” is “comparable with that of a *process* to its *product*.” The *cogito* “refers to the ‘performance’ (to the act of thinking) through which the sentence ‘I exist’ may be said to verify itself.”).

¹³⁰ Orthodox Judaism, for example, requires that all available means be used to save or prolong life with the exception of the terminally ill patient, for whom these measures are not mandated. See GEORGE ROBINSON, *ESSENTIAL JUDAISM: A COMPLETE GUIDE TO BELIEFS, CUSTOMS, AND RITUALS* 189–190 (2016); Rabbi Dov Linzer, *Treatment of Terminally Ill Patients According to Jewish Law*, 15 *AM. MED. ASS’N J. ETHICS* 1081, 1081 (2013). Catholicism takes a similar viewpoint.

partially anti-science stances are not equivalent, and the latter ought to give way to the former.¹³¹

To the extent that religions partially accept, and benefit from, science, the constitutional pluralist ethos requires according priority to freedom of scientific inquiry in all its multifaceted dimensions. Moreover, these two fundamental requirements regarding secularism—namely, equal consideration and freedom of scientific inquiry—should furnish criteria to determine whether or not any particular reframing of fundamental rights from the standpoint of religious nationalism or pluralism is consistent with the minimum requirements of contemporary democratic constitutionalism. In short, any religious nationalist or populist understanding or reformulation of a fundamental right that fails to give the equal consideration due to secularism or to the integrity of science would exceed the acceptable bounds set by contemporary democratic constitutionalism.

III. ILLIBERAL AND ANTI-PLURALIST RECOURSES TO RELIGION CONGRUENT WITH NATIONALIST AND POPULIST RESHAPING OF FUNDAMENTAL RIGHTS

In what follows, we examine four different contemporary initiatives involving concerted recourse to religion for purposes of weakening or undermining institutional secularism, or at least one of its two critical mainstays—namely, pluralism and forbidding any contested religious truth from commanding the state or constraining the public sphere. As will become obvious, some of these initiatives are plainly nationalistic, such as the one involving tying Hinduism to secularism in India. Others, however, such as the state display of Christian symbols in public schools in a constitutionally secular state such as Italy, or the linking of Christianity, reason, and natural law—as Mike Pompeo’s “Commission on Unalienable Rights” does in the United States—are obviously not inherently nationalistic or populist.

¹³¹ A religion that rejected science in whole and that forbade the use or benefit of any of the products of science could well avoid all inconsistency and, hence, all vulnerability to the secular claim under consideration. However, the most populous religions in Western constitutional democracies—Christianity, Islam, and Judaism—all accept many important benefits of modern science in areas such as health, communications, or transportation. See Rosenfeld, *supra* note 1 at 28, 38.

Indeed, Pope Benedict's equating the precepts issuing from Catholic faith and reason as the common foundation of natural law, to which we alluded above,¹³² has no inherent connection to either nationalism or populism. Quite to the contrary, it seems fair to understand the former Pope as promoting what he regards as a universally valid morality issuing from the true religion and the proper use of reason, which yields a universally valid natural law that remains immutable, regardless of any nationalist or populist aspirations. Nevertheless, because of the broader socio-political context in which they are inserted, both Italy's use of religious symbols and the Pompeo unalienable rights initiative in the United States emerge as thoroughly nationalist, as we shall detail below. More generally, as we hope will become manifest in the course of what follows, all four of the initiatives that we will now discuss illustrate many of the ways in which religious nationalism and populism did or could reshape liberal constitutional rights in order to render them less amenable to pluralism and more apt to impose contestable, asserted truths on those who would otherwise reject them.

A. *Reshaping Secularism as Religious Majoritarianism: The Case of India*

India constitutes an example of a system where constitutional secularism has undergone a systematic attack by a nationalist party, the Hindu Right, which has sought to redefine its significance to suit its majoritarian political agenda—that is, the installation of religion and culture as primary attributes of nationalism and citizenship identity.¹³³

Indian secularism differs from its Western counterparts in two fundamental ways. First, it does not pursue the ideal of strict separation and neutrality, but, rather, a “principled distance” between religion and the state, which entitles the latter to robustly intervene in religious matters, particularly in the affairs of the country's majority religion. Second, Indian secularism, by striking a balance between individual

¹³² See *supra* Section I.A.

¹³³ JYOTIRMAYA SHARMA, HINDUTVA: EXPLORING THE IDEA OF HINDU NATIONALISM 4 (rev. ed. 2011); CHRISTOPHE JAFFRELOT, THE HINDU NATIONALIST MOVEMENT IN INDIA 27 (1998) (discussing that India as conceived by Vinayak Damodar Savarkar, one of the intellectual founders of the Hindutva movement, “cannot be dissociated from Hindu culture and the Hindu people”).

religious rights and the claims of religious communities, does not entail the absolute confinement of religion in the private sphere.¹³⁴ This resonates with Hinduism's emphasis on religious practices rather than on religious belief: because practices have a fundamental collective dimension, their preeminence naturally entails the valorization of religious communities.¹³⁵ While the distinctive characters of Indian secularism are crucial to understand its implementations and applications, they should not obscure the fact that the country adopted a secular constitution for reasons that are fully comparable to those that prompted Western countries, such as France and the United States, to also enshrine secularism in their constitutions. As Rajeev Bhargava explains, "secularism, anywhere in the world, means a separation of organized religion from organized political power inspired by a specific set of values."¹³⁶ As we have seen in the preceding pages, these values boil down to protecting individuals from religious oppression, ensuring that they enjoy freedom of religion and conscience, as well as setting the conditions for the peaceful coexistence of different conceptions of the good within the polity. Different systems may "select different elements from the stock of values that give separation its point . . . [or] place different weights on the same values."¹³⁷ In all cases, however, the aim is to ensure the freedom and equality of all citizens in a pluralistic polity.

The Hindu Right, which emerged in the nineteenth century as a nationalist force relying on Hindu culture to oppose colonialism, has systematically pushed to "redefine the meaning and parameters of the various components of secularism . . ."¹³⁸ To this end, the Hindu Right has put forward three lines of reasoning. First, it challenges the special protection provided to religious minorities on the ground that this protection contravenes the principle of equality. This constitutes a

¹³⁴ Article 25 of the Indian Constitution protects all persons' freedom of conscience and religion, but also confers to the State the power to regulate and even restrict "any economic, financial, political or other secular activity which may be associated with religious practice," as well as an exclusive entitlement for the "social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." INDIA CONST. art. 25, §§ 1–2(b).

¹³⁵ Bhargava, *supra* note 119.

¹³⁶ *Id.* at 21.

¹³⁷ *Id.* at 22.

¹³⁸ Ratna Kapur, *Secularism's Others: The Legal Regulation of Religion and Hierarchy of Citizenship*, in HANDBOOK ON CONSTITUTIONS AND RELIGION 43 (Susanna Mancini ed., 2020) [hereinafter Kapur, *Secularism's Others*].

direct blow to two fundamental tenets of the Indian Constitution: “contextual secularism,” which rejects the notion of strict neutrality and equidistance; and a substantive notion of equality. The Hindu Right argues that the traditional accommodation of religious minorities (including through personal laws) violates formal equality and the “true spirit” of secularism, pushing, as Ratna Kapur explains, to establish “an unmodified majoritarianism whereby the majority Hindu community becomes the norm against which all others are to be judged and treated.”¹³⁹ The second line of argument put forward by the Hindu Right relies on the construction of Hinduism as the only religion which is compatible with secularism. Unlike universal religions, such as Islam and Christianity, that rely on proselytism, Hinduism is supposedly committed to secular values, such as religious freedom and tolerance. Hence, “only Hindus are truly secular [citizens].”¹⁴⁰

Finally, the Hindu Right has sought to redefine the content of Hinduism in order to expand its protection under the right of freedom of religion to the detriment of religious minorities. Specifically, it has put forward the notion that among the thousands of Hindu gods, Lord Ram holds a superior status. While this view is highly contested by historians in India,¹⁴¹ it has allowed the Hindu Right to justify the destruction of a sixteenth-century mosque by a large mob comprised of members from various Hindu organizations on the ground that it had been built on Lord Ram’s birthplace (Ayodhya), and that worship at this particular spot constitutes a fundamental tenet of Hinduism, and is therefore protected by the right to religious freedom.¹⁴² This incident occasioned a series of cases that were litigated before the Supreme Court of India, and that marked a shift in its jurisprudence.¹⁴³ The Indian government acquired the land where the mosque had been destroyed

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ S.P. Udayakumar, *Historicizing Myth and Mythologizing History: The ‘Ram Temple’ Drama*, 25 SOC. SCIENTIST 11, 23 (1997).

¹⁴² Ratna Kapur, *The “Ayodhya” Case: Hindu Majoritarianism and the Right to Religious Liberty*, 29 MD. J. INT’L L. 305, 306–09 (2014).

¹⁴³ See Princeton University Press, *Ayodhya, the Babri Masjid, and the Ramjanmabhumi Dispute*, in HINDU NATIONALISM: A READER 279, 287–88 (Christophe Jaffrelot ed., 2007) (citing GULAB VAZIRANI, LAL ADVANI, *THE MAN AND HIS MISSION* (1991), an interview with Lal Krishna Advani—the seventh Prime Minister of India and a co-founder of the BJP—in which Advani opines that the Court’s jurisprudence over the Ayodhya controversy is not sufficient settlement from the Hindu Right’s perspective).

with the purpose of building a Hindu temple alongside a new mosque. The land acquisition was challenged by a Muslim petitioner on the ground that it violated the principle of secularism and the right of religious freedom of Indian Muslims. The Court, however, rejected both claims, and concluded that a mosque is not an essential part of the practice of the religion of Islam,¹⁴⁴ and that prayer by Muslims could be offered anywhere, even in the open.¹⁴⁵

Indeed, for many years the Supreme Court of India had upheld the traditional significance of Indian “contextual secularism.” As the Ayodhya cases show, however, starting in the mid 1990s, its case law progressively absorbed the agenda of the Hindu Right, ultimately altering the significance of equality, tolerance, and freedom of religion in India, as well as the conceptualization of citizenship.¹⁴⁶ The court expanded the scope of Hinduism, conceptualizing it not just as a religion, but as the “way of life” of the entire country,¹⁴⁷ while concurrently dealing restrictively with Islam. The shift in the court’s case law is also clearly noticeable in a series of cases concerning the legitimacy of speeches appealing to *Hindutva* (an ideology that seeks to define Indian culture in terms of Hindu values) in the context of political elections. The court held that speeches appealing to Hinduism and *Hindutva* during election campaigns do not breach election laws or

¹⁴⁴ “The essential practices test has been used by the court to decide a variety of cases. These can broadly be classified under a few heads. First, the court has taken recourse to this test to decide which religious practices are eligible for constitutional protection. Second, the court has used the test to adjudicate the legitimacy of legislation for managing religious institutions. Finally, the court has employed this doctrine to judge the extent of independence that can be enjoyed by religious denominations.” Ronojoy Sen, *Reforming Religion: The Indian Constitution, the Courts and Hinduism*, in HANDBOOK ON CONSTITUTIONS AND RELIGION 226 (Susanna Mancini ed., 2020).

¹⁴⁵ *Dr. M. Ismail Faruqui Etc, vs Union Of India And Others* AIR 1995 SC 605 A (1994) (India).

¹⁴⁶ Kapur, *Secularism’s Others*, *supra* note 138, at 43–46.

¹⁴⁷ In *Sastri Yagnapurushadji v. Muldas Brudardas Vaishya*—the first decision where the Supreme Court held that Hinduism is not a religion but merely a way of life: “When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.” *Sastri Yagnapurushadji v. Muldas Brudardas Vaishya* (1966) 3 SCR 242 (India) (emphasis added). This pronouncement also paved the way for the Supreme Court to later hold that not only Hinduism, but even *Hindutva*, is merely a way of life of the entire subcontinent.

the Constitution. The speeches were constitutionally challenged not only on the grounds of appealing to voters on the basis of the candidate's Hindu religion, but also for their extremely vituperative and derogatory character, and, therefore, for having the propensity to incite hatred and enmity between religious communities. Yet, the court gave a broad and expansive meaning to "Hinduism" and "Hindutva," and asserted that the appeals to *Hindutva* merely refer to "the way of life of the people in the subcontinent" rather than "an attitude hostile to [] persons practising [] other [religions or an appeal to religion]," and that it was "difficult to appreciate how . . . [the right wing's position could] be assumed to . . . be equated with narrow fundamentalist Hindu religious bigotry . . ." ¹⁴⁸ According to the court, the appeals to *Hindutva* "promote secularism or [] emphasise the way of life of the Indian people and the Indian culture . . ." ¹⁴⁹ This assertion not only drastically reduces the rich tradition of Hinduism to its interpretation by the Hindu Right, but it also leaves "no room for other non-Hindu ways of being Indian." ¹⁵⁰

The conflation of secularism and religious majoritarianism is also clearly perceivable in India's increasing "culturalization" of citizenship. In December 2019, India adopted the Citizenship Amendment Act, which provides a fast-track for the acquisition of citizenship for illegal immigrants from Afghanistan, Bangladesh, or Pakistan who arrived in India before 2014, and who are Hindu, Sikh, Buddhist, Jain, Parsi, or Christian. ¹⁵¹ While the amendment was presented by the Bharatiya Janata Party (BJP), or Indian People's Party, as a tool of protection for individuals who belong to persecuted minorities, it is just the latest chapter of a long history of discrimination against Muslim migrants. ¹⁵² This is consistent with the Hindu Right's channeling of the immigration issue in essentially religious terms, "as a

¹⁴⁸ Dr. Ramesh Yeshwant Prabhoo v. Shri Prabhakar Kashinath Kunte, AIR 1996 SC 1113, 1129 (India).

¹⁴⁹ *Id.*

¹⁵⁰ Kapur, *Secularism's Others*, *supra* note 138, at 45.

¹⁵¹ Citizenship Act, 1955, No. 57 of 1955, INDIA CODE, § 2, *amended by* Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019.

¹⁵² See Francesca Raimondo, *The "Religion of Citizenship": The Indian Citizenship Amendment Act 2019*, IACL-AIDC BLOG (July 2, 2020), <https://blog-iacl-aidc.org/2020-posts/2020/7/2/the-religion-of-citizenship-the-indian-citizenship-amendment-act-2019> [<https://perma.cc/2MUV-VRGL>].

tension between the Hindu insider and the Muslim outsider.”¹⁵³ In a case decided in 2005, for example, the Supreme Court of India had characterized Muslim immigration from Bangladesh as a form of “external aggression,” warning that it would have “dangerous consequences . . . for the Nation as a whole . . . [and that no] misconceived and mistaken notions of secularism should be allowed to come in the way of [recognizing this reality].”¹⁵⁴ The 2019 Act takes a further step in constructing Muslims as threatening, irreconcilable outsiders. Indeed, the U.N. High Commissioner for Human Rights has opined that the Act is “fundamentally discriminatory in nature,”¹⁵⁵ as it violates Article 14 of the Indian Constitution, which guarantees to all persons the equal protection of the laws within the territory of India, and has filed an application to the Supreme Court of India. The European Parliament has also drafted a joint resolution which characterizes the Act as “dangerously divisive.”¹⁵⁶

B. *Reinforcing the Privilege of Christian Majorities in Europe
Through the Imposition of Religious Symbols in State Schools*

Attacks on constitutional secularism often involve struggles over the presence of the majority religion’s symbols in public institutions, such as courtrooms and state schools.

Indeed, religious symbols play a key role in identity-related dynamics. Thanks to their capacity for evoking unquestioned belonging, they allow for the construction of simplified and artificial identities, and thus provide clear-cut dividing lines by building unity within “the people” and the nation while strengthening divisions with those who do not belong. Religious symbols often play into the hands of nationalists and populists as catalyzers of aggression because they are capable of expressing and generating a primitive intellectual and

¹⁵³ Kapur, *Secularism’s Others*, *supra* note 138, at 49.

¹⁵⁴ Sarbananda Sonowal v. Union of India, AIR 2005 SC 2920, ¶¶ 22, 32 (India).

¹⁵⁵ Press Release, U.N. Human Rts. Off. of the High Comm’r, Press Briefing on India (Dec. 13, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25425&LangID=E> [<https://perma.cc/FFN4-FEW2>].

¹⁵⁶ Joint Motion for a Resolution Pursuant to Rule 132(2) and (4) of the Rules of Procedure Replacing Scattered Motions on India’s Citizenship (Amendment) Act, 2019, EUR. PARL. DOC. 2519 (RSP), ¶ 1 (Jan. 28, 2020), https://www.europarl.europa.eu/doceo/document/RC-9-2020-0077_EN.pdf [<https://perma.cc/4AEV-ABPX>].

relational level of human development at the level of blind fixation and belonging.¹⁵⁷ Religious symbols also visibly “mark” the public sphere. Their presence—or their banning—symbolize the prevailing power relations between different cultures and identities. Thus, for example, the display of Christian symbols, such as a crucifix in state schools or courtrooms, identifies the “official” state culture with that of the majority religion. By the same token, the exclusion of minority symbols—such as Muslim traditional attire—marks the marginalization of the culture that such symbols are assumed to represent.

A particularly salient example of the use of religion as a divisive marker of national identity was the controversy over the display of Orthodox icons in Romanian public schools, which occurred between 2006 and 2008. In 2006, petitioner Emil Moise challenged the display of religious icons in his child’s public school before the Romanian National Council for Combating Discrimination. The Council agreed that the massive display of icons in state schools violated the principle of state neutrality and was potentially discriminatory. It thus advised the Ministry of Education to restrictively regulate the presence of icons in public schools, enabling their display only during the teaching of religion.¹⁵⁸ The Bucharest Court of Justice rejected the Ministry’s challenge of the Council’s decision on the ground that the latter was consistent with human rights standards and religious pluralism.¹⁵⁹ In 2008, however, the Romanian Supreme Court of Justice quashed the Bucharest court’s decision and confirmed the legitimacy of the display of icons in public schools.¹⁶⁰ The case triggered a heated controversy, exposing a deep division within Romanian society concerning the role of Orthodox Christianity in defining the country’s national identity. Romanian media widely covered the icons issue and the debate reached an almost apocalyptic dimension, as attested by a series of headlines

¹⁵⁷ Luigi Lombardi Vallauri, *Simboli e realizzazione*, in *SYMBOLON/DIABOLON: SIMBOLI, RELIGIONI, DIRITTI NELL’EUROPA MULTICULTURALE* 13, 14 (Eduardo Dieni, Alessandro Ferrari & Vincenzo Pacillo eds., 2005).

¹⁵⁸ Consiliul Național pentru Combaterea Discriminării [CNCD] [National Council for Combating Discrimination] Decision No. 323 (2006) (Rom.).

¹⁵⁹ Curtea de Apel București [CA București] [Bucharest Court of Appeals] Civil Sentence No. 1685, File No. 1327/2/2007 (Rom.).

¹⁶⁰ Înalta Curte de Casație și Justiție [ICCJ] [High Court of Cassation and Justice] Decision No. 2398/2008, File No. 1327/2/2007 (2008) (Rom.).

issued between 2006 and 2008, such as “The war of icons,” “The scandal of icons exiled from schools,” “The trial of icons—part of a plan to destroy faith,” and “The renaissance of iconoclasm, the first step to the pursuit of Christianity in Romania.”¹⁶¹ Unsurprisingly, the Orthodox Church, which has become an important ally of the political class as well as one of the most respected institutions in Romania since the fall of the communist regime,¹⁶² vocally advocated for the presence of icons in public schools. Civil society became deeply involved in the controversy and a special Coalition for the Observance of Religious Faith was put together by hundreds of non-governmental organizations for the purpose of advocating for the presence of icons in state schools.¹⁶³ According to Gizela Horváth and Rozália Bakó, who undertook an empirical analysis of the arguments, the rhetoric, and the language used in the context of the icons debate, there were some key differences between the factions supporting the icons and those opposing them. The latter relied mainly on human rights arguments—specifically, on equality rights, religious freedom, minority protection, and children’s rights—and on the secular character of the state.¹⁶⁴ To the contrary, pro-icon advocates tended to put forward either moral arguments—equating the Orthodox religion with morality—or, more often, arguments based on the overlapping of religion and national identity.¹⁶⁵ Icons were “presented as constitutive parts of the soul of the Romanians . . . [using an] ‘organicist metaphor’: icons can not be torn out of the soul of Romanians.”¹⁶⁶ The controversy was often presented

¹⁶¹ Gizela Horváth & Rozália Bakó, *Religious Icons in Romanian Schools: Text and Context*, 8 J. FOR THE STUDY OF RELIGIONS & IDEOLOGIES 189, 189 (2009).

¹⁶² *Id.* at 190–92.

¹⁶³ *Id.* at 191.

¹⁶⁴ While the Romanian Constitution does not explicitly state the secular character of the state, it implicitly affirms the principle of separation of Church and State. Indeed, Article 29 (on “freedom of conscience”), protects the individual’s rights to freedom of conscience and to the manifestation of religious belief, as well as the autonomy of religious denominations. The constitution does not grant the Orthodox Church, by far the country’s largest, any special status. It guarantees nondiscrimination based on religious belief or membership, as well as the protection of the confessional component of the identity of national minorities. See CONSTITUȚIA ROMÂNIEI [CONSTITUTION] art. 29 (Rom.). Moreover, the Law 489/2006 on Religious Freedom and Denomination declares that the state is neutral. See Liviu Andreescu, *Romania’s New Law on Religious Freedom and Religious Denominations*, 36 RELIGION, ST. & SOC’Y 139, 147 (2008).

¹⁶⁵ Horváth & Bakó, *supra* note 161, at 200–01.

¹⁶⁶ *Id.* at 202.

as the result of a conspiracy against the Romanian Church and the Romanian people, led by foreign forces loyal to George Soros,¹⁶⁷ and involved personal attacks on public figures such as journalists and civil rights activists, who were portrayed as Bolsheviks, Extremists, or even Taliban.¹⁶⁸

The high-profile *Lautsi* case, decided by the European Court of Human Rights (ECtHR) in 2011, also sparked controversy over the display of Christian symbols in state schools. The case concerned the legitimacy of the mandatory display of crucifixes in Italian public schools under the European Convention on Human Rights (ECHR). Prior to reaching the ECtHR, the case had been litigated before the Italian administrative courts, which, in order to justify the presence of crucifixes against the backdrop of a secular constitution, had relied on similar arguments to those put forward by the Supreme Court of India in its jurisprudence analyzed above.¹⁶⁹ The crucifix was declared to embody social and cultural values shared by believers and non-believers, and to evoke the fundamental principles of the Italian legal order, including the principle of secularism. Indeed, according to the Italian courts, inherent in Christianity are the ideas of tolerance and freedom, which constitute the basis of a secular state. Therefore, it would be a paradox to exclude a Christian symbol from the public domain in the name of a principle such as secularism, which is actually rooted in, and wholly compatible with, the Christian religion. Just as in India where Hinduism has been interpreted extensively by the courts as the way of life of the entire secular subcontinent, Italian courts have envisioned Christianity as representing “the principles of dignity, tolerance and religious freedom and therefore . . . the very foundation of a secular state.”¹⁷⁰ Specifically, Italian courts have characterized the crucifix as “the symbol of our history and our culture and, consequently, of our identity . . . and also of the principle of state secularism.”¹⁷¹ Conversely, akin to the Indian courts, Italian judges have cast doubts on the compatibility of Islam with the secular state, alluding

¹⁶⁷ *Id.* at 201.

¹⁶⁸ *Id.* at 202.

¹⁶⁹ TAR Veneto, 17 marzo 2005, n. 1110, para. 16 (It.) (translation by authors).

¹⁷⁰ TAR Veneto, n. 1110, ¶ 11.6 (It.) (translation by authors); Cons. Stato, 15 febbraio 2006, Decisione Sez. 4575/03-2482/04 (It.).

¹⁷¹ *Id.* ¶ 12.4 (translation by authors).

to “the problematic relationship between certain states and the *Islamic* religion,”¹⁷² as well as to “the need to reaffirm, even symbolically, our identity,” in order to “avoid a clash of civilizations.”¹⁷³ Finally, Italian judges have emphasized the importance of displaying crucifixes in state schools to teach “*non European* pupils . . . to reject all forms of *fundamentalism*.”¹⁷⁴ In sum, in both the Indian as well as the Italian cases, the country’s majority religion is assumed to be naturally inclusive and encompassing of the ideas of tolerance and freedom, which constitute the basis of a secular state.¹⁷⁵

The *Lautsi* case acquired a European dimension after Ms. Lautsi challenged the display of the crucifix before the ECtHR. The court first condemned Italy on the ground that such display violated freedom of religion and the rights of parents to educate children according to their beliefs.¹⁷⁶ This decision immediately became highly controversial, turning the court into the target of virulent attacks. The mobilization that followed exposed a deep division among the member states of the Council of Europe concerning the role of Christianity in the European public sphere and in defining European identity. It also showcased a versatile use of the rhetoric of religious nationalism, which applies to both single countries as well as to Europe as a political unit. Thus, the crucifix went from symbolizing Italian national identity to representing European identity—the two coinciding as challenged by immigration and secularization. Accordingly, both Italy and Europe became envisioned as somehow projecting the ethos of the same religious identity on the scale of the nation-state, as well as on that of

¹⁷² *Id.* ¶ 10.1.

¹⁷³ *Id.* ¶ 12.6.

¹⁷⁴ *Id.* (emphasis added).

¹⁷⁵ In a similar fashion, in 1991 the Bavarian Constitutional Court upheld the legitimacy of displaying crucifixes in public school, holding that: “Representations of the cross . . . are . . . not the expression of a conviction of a belief bound to a specific confession. They are an essential object of the general Christian-occidental tradition and common property of the Christian-occidental cultural circle.” Moreover, the judgment explicitly draws the difference between the display of the crucifix—which is legitimate—and “cases in which the teacher through especially determined behavior—in particular through the wearing of attention-drawing clothing (Baghwan)—which unambiguously indicates a specific religious or philosophical conviction, impermissibly impairs the basic right to negative religious freedom of pupil and parent.” Bayerischer Verwaltungsgerichtshof [BAYVGH] [Bavarian Higher Administrative Court] June 3, 1991, 122 Bayerische Verwaltungsblätter [BAYVBL] 751, 751–54 (Ger.).

¹⁷⁶ *Lautsi v. Italy*, ([GC] App. No. 30814/06) 2011-III Eur. Ct. H.R. ¶ 4, at 66, ¶ 32, at 80.

Europe's distinct transnational culture, as overlapping political units that are framed as Christian-imagined communities.¹⁷⁷

The ten most deeply confessional member states of the Council of Europe intervened in the case supporting Italy's request to overturn the decision,¹⁷⁸ including the countries most often condemned by the ECtHR for discriminating against religious minorities (Russia, Greece, Bulgaria, and Cyprus). This led a commentator to stress how "Italy . . . has defended the Central-Eastern Europe of traditions against the Western Europe of pluralistic neutrality."¹⁷⁹ The *Lautsi* case also attests to the emergence of a network of right-wing actors and lobbies that work to defend and expand the privileges of Christian majorities in Europe.¹⁸⁰ The ECtHR's Chamber decision was reversed by its Grand Chamber,¹⁸¹ thanks to the combined effort of a "variegated coalition of actors" ranging from the Vatican to Russia, as well as to American Conservative Evangelicals, whose experience in religious litigation served as a model for their European counterparts.¹⁸² Gregór Puppinc, the Director of the European Center for Law and Justice,¹⁸³ which submitted a brief advocating for reversing the Chamber decision, openly called

¹⁷⁷ See generally ANDERSON, *supra* note 21.

¹⁷⁸ The intervening countries were the Russian Federation, Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, and San Marino.

¹⁷⁹ Marco Ventura, *La Tradizione come Diritto*, CORRIERE DELLA SERA, Mar. 19, 2011, at 19 (translation by the Authors).

¹⁸⁰ See generally Christopher McCrudden, *Transnational Culture Wars*, 13 INT'L J. CONST. L. 434 (2015).

¹⁸¹ *Lautsi*, 2011-III Eur. Ct. H.R. ¶ 77, at 97.

¹⁸² Pasquale Annicchino, *Winning the Battle by Losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evangelicals, the Russian Orthodox Church and the Vatican to Reshape European Identity*, 6 RELIGION & HUMAN RTS. 213, 213 (2011).

¹⁸³ The Strasburg-based European Center for Law and Justice (ECLJ), is the European branch of the American Center for Law and Justice (ACLJ), founded in 1990 by fundamentalist Evangelical Pat Robertson. It is funded by the ACLJ and it pursues a similar agenda, mainly focused on opposing reproductive rights and LGBTQ+ equality, and on expanding the privileges of Christian majorities. See *About the ECLJ*, EUR. CTR. L. & JUST., <https://eclj.org/about-us> [<https://perma.cc/LA58-3C2W>].

for an “Alliance against secularism”¹⁸⁴ to wage a “battle of cultural identity.”¹⁸⁵ In his opinion:

Lautsi is a symbol of the current conflict regarding the future of Europe’s religious and cultural identity. The conflict contains on one side proponents of the complete secularization of Europe, and on the other, those who desire an open Europe, one that is faithful to its true identity and historical roots. Proponents of secularization see secularism, however, as a solution to managing religious pluralism. Moreover, they perceive pluralism as an argument that justifies the imposition of secularism. The so called “religious neutrality of society” (“secularization”) is nothing else but, concretely, the “de-Christianization” of European culture and society.¹⁸⁶

Puppinck accused the European institutions of:

[P]romot[ing] a cultural model in which the absence of values (neutrality) and relativism (pluralism) are values in themselves. These institutions are thus supporting a policy that wishes to be post-religious and post-identity, in short, postmodern; and this policy seeks to exclude all other systems, claiming, in essence, to be a philosophical monopoly.¹⁸⁷

In order to counter this scenario, he stressed the importance of joining forces with the Russian Orthodox authorities, who had been very vocal concerning the importance of reversing the first *Lautsi* judgment,¹⁸⁸ and, more generally, of pursuing a “strategic alliance

¹⁸⁴ Grégor Puppinck, *Lautsi v. Italy: An Alliance Against Secularism*, L'OSSERVATORE ROMANO (July 28, 2010), www.eclj.org/pdf/ECLJ-LautsiItaly-crucifix-case-20110315.pdf [<https://perma.cc/A9LR-NTFN>] [hereinafter Puppinck, *An Alliance Against Secularism*].

¹⁸⁵ Grégor Puppinck, *Lautsi v. Italy: The Leading Case on Majority Religions in European Secular States 1* (Oct. 3–6, 2010) (unpublished manuscript).

¹⁸⁶ Puppinck, *An Alliance Against Secularism*, *supra* note 184, at 2.

¹⁸⁷ *Id.* at 2–3.

¹⁸⁸ Patriarch Kyril of Moscow had written to the then-Prime Minister of Italy, Silvio Berlusconi, offering his support in the *Lautsi* affair: “The Christian heritage in Italy and other countries in Europe should not become a matter to be considered by European human rights institutions. Christian religious symbols present in the public space in Europe are part of the common European identity without which neither the past nor the present or the future of this continent are thinkable. The pretext of ensuring the secular nature of a state should not be used to assert an anti-religious ideology, which apparently violates peace in the community, discriminating against the religious majority in Europe which is Christian.” Annicchino, *supra* note 182, at 217 (citing *Italy’s Ambassador to Moscow Thanks Moscow Patriarchate for Support*

between Catholics and Orthodox” Christians to join in defense of the tradition “against secularism, liberalism and relativism prevailing in modern Europe.”¹⁸⁹

C. *Natural Law, Natural Rights, and the Religion of the Nation*

As we have seen in the preceding discussion, nationalist and populist actors cast religious arguments in the language of “natural law,” to attack the very legitimacy of the dominant conception of constitutionalism and its nexus to institutional secularism, and in particular to delegitimize the “culture of rights.” Their arguments—which have gained prominence with the increasing influence of Catholic intellectuals in conservative Christian activism—invoke reason instead of faith, and use the language of religious freedom and anti-discrimination, based on the claim that the right use of reason in legal arguments leads to the same conclusions as theological reasoning. In this light, “moral truths are inscribed in a universal natural law available to human reason.”¹⁹⁰ Reliance on “natural law” and “natural rights” goes hand-in-hand with a selective vision of human rights, whereby some are elevated as inherently moral, and thus truly fundamental, while other rights are disregarded as merely political. In 2019, U.S. Secretary of State Mike Pompeo launched the “Commission on Unalienable Rights” to introduce reforms of “human rights discourse where such discourse has departed from our nation’s founding principles of natural law and natural rights.”¹⁹¹ The Commission is chaired by Harvard Professor Mary Ann Glendon, according to whom “the post-World War II dream of universal human rights risks dissolving into scattered rights of personal autonomy . . . a

in Getting the Case of Lautsi Reviewed, RUSSIAN ORTHODOX CHURCH: DEP’T EXTERNAL CHURCH REL. (June 23, 2011, 3:15 PM), <https://mospat.ru/en/2011/06/23/news43653> [<https://perma.cc/KW4N-YQUL>]).

¹⁸⁹ Puppinc, *supra* note 184, at 6 (citing Robert Moynihan, *Letter #47, from Moscow, Hilarion*, INSIDE THE VATICAN (Nov. 11, 2009), <https://insidethevatican.com/news/newsflash/letter-47-from-moscow-hilarion>[<https://perma.cc/7NXY-64BY>] (quoting an interview conducted with Metropolitan of Volokolamsk, Hilarion Alfeyev)).

¹⁹⁰ Julieta Lemaitre, *By Reason Alone: Catholicism, Constitutions, and Sex in the Americas*, 10 INT’L J. CONST. L. 493, 494 (2012).

¹⁹¹ Department of State Commission on Unalienable Rights, 84 Fed. Reg. 25,109 (May 30, 2019).

range of novel sexual liberties might one day become the bread and circuses of modern despots—consolation prizes for the loss of effective political and civil liberties.”¹⁹² Pompeo himself decried the merger between “unalienable,” or God-given, and man-made (ad hoc) rights, a dichotomy that contradicts the fundamental tenet of human rights law, that all rights are universal and equal, interdependent and interrelated.¹⁹³ In July 2020, the Commission released a draft, which suggests how American international human rights policy should better reflect what the Commission characterizes as the nation’s founding principles: Protestantism, civic republicanism, and classical liberalism.¹⁹⁴ In this light, not all rights are equally fundamental: to the contrary, property rights and religious liberty are supposedly “foremost” among human rights, while social and economic rights are not “compatible [with the American founding principles] when they induce dependence on the state, and when, by expanding state power, they curtail freedom—from the rights of property and religious liberty to those of individuals to form and maintain families and communities.”¹⁹⁵ According to the draft report, at the core of unalienable rights lies the concept of human dignity, upon which rests the United Nations’ 1948 Universal Declaration of Human Rights (UDHR), which “is not created by political life or positive law but is prior to positive law and provides a moral standard for evaluating positive law.”¹⁹⁶

¹⁹² Mary Ann Glendon, *Reclaim Human Rights*, FIRST THINGS (Aug. 2016), <https://www.firstthings.com/article/2016/08/reclaim-human-rights> [https://perma.cc/3GXG-ZKM6].

¹⁹³ Michael R. Pompeo, *Unalienable Rights and U.S. Foreign Policy*, WALL ST. J. (July 7, 2019), <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448> [https://perma.cc/2KH3-JNYZ] (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”); see also “U.N. HIGH COMM’R FOR HUMAN RIGHTS, *Vienna Declaration and Programme of Action*, art. 5 (June 25, 1993), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> [https://perma.cc/967J-JNEL].

¹⁹⁴ U.S. COMM’N OF UNALIENABLE RIGHTS, DRAFT REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS 8 (July 16, 2020)[hereinafter DRAFT REPORT], <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf> [https://perma.cc/G67K-265J].

¹⁹⁵ *Id.* at 21.

¹⁹⁶ *Id.* at 31.

The draft report admits that the UDHR “refrains from specifying the ultimate source of that dignity,”¹⁹⁷ but it asserts that in U.S. constitutionalism, unalienable rights “were the form in which the American founders gave expression to the idea of an inherent human dignity.”¹⁹⁸

This construction raises serious perplexities. The enshrining of human dignity in the UDHR “was the culmination of a significant historical evolution of the concept” in Western philosophy and political theory.¹⁹⁹ This concept tracing back to Roman times has acquired different meanings, both religious and non-religious, throughout the Middle Ages and the Enlightenment, when dignity was developed as a philosophical concept. Immanuel Kant provided one of the most influential non-religious conceptualizations of human dignity, as a principle requiring that individuals should be treated as ends and not as means to an end.²⁰⁰ Indisputably, however, the incorporation of dignity in the UDHR constitutes a direct response to the horrors perpetrated during the Holocaust and to the political theories and the legal systems that paved the way to, and sought to legitimate, such horrors. Significantly, human dignity is incorporated in constitutions emerging from, and/or reacting to, racist, fascist, and otherwise heavily discriminatory systems: the German Basic Law²⁰¹ and other post-World War II European constitutions,²⁰² the constitutions of South Africa²⁰³

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 656 (2008).

²⁰⁰ IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 78, Ak 4:462 (Allen W. Wood ed. & trans., 2002) (1785).

²⁰¹ Article 1 of the German Basic Law states: “(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.” GRUNDGESETZ [GG] [BASIC LAW] art. 1, *translation at* https://www.gesetze-im-internet.de/englisch_gg (Ger.) [<https://perma.cc/K7YV-BDN3>].

²⁰² *See, e.g.*, Art. 3 Costituzione [Cost.] (It.) (“All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.”).

²⁰³ S. AFR. CONST., 1996 ch. 1 § 1 (“The Republic of South Africa is one, sovereign, democratic state founded on the following values: a. Human dignity, the achievement of equality and the advancement of human rights and freedoms; b. Non-racialism and non-sexism.”).

and of numerous Latin American countries,²⁰⁴ as well as an Israeli Basic Law.²⁰⁵

The framers of the U.S. Constitution did not incorporate human dignity, and it is questionable, to say the least, whether the “unalienable rights” that were at that time monopolized by white, property-owning men could be seen as the “expression to the idea of an inherent human dignity” in a constitutional system where slaves counted as three-fifths of a free individual for the purposes of determining congressional representation.²⁰⁶

Significantly, the expression “human dignity” first appeared in the U.S. Reports only in 1946.²⁰⁷ Since then, as Vicki Jackson explains, “[a]lthough some members of the U.S. Supreme Court in the postwar period have embraced human dignity as a motivating principle for the U.S. Bill of Rights, the role of the concept of ‘human dignity’ in the Court’s jurisprudence is episodic and underdeveloped.”²⁰⁸ Indeed, contrary to what Pompeo’s draft report suggests, human dignity is directly implicated in the protection of social and economic rights. It is, in effect, “a core component of constitutional jurisprudence” in systems which also incorporate “obligations of social solidarity (and government support of positive welfare) not found in the U.S. Constitution.”²⁰⁹ In this respect, human dignity actually sets limitations to economic freedoms, as clearly highlighted by Article 41 of the Italian Constitution, according to which “[p]rivate economic enterprise . . . may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity.”²¹⁰

²⁰⁴ See, e.g., CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 1, *translated in Colombia’s Constitution of 1991 with Amendments through 2015*, CONSTITUTE 4 (May 12, 2020), https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en [http://perma.cc/YK93-GL7J] (“Colombia is a social state under the rule of law, organized in the form of a unitary republic, decentralized, with autonomy of its territorial units, democratic, participatory, and pluralistic, based on the respect of human dignity, the work and solidarity of the individuals who belong to it, and the prevalence of the general interest.”).

²⁰⁵ Basic Law: Human Dignity and Liberty, 5752–1992, HH No. 2086 p. 60 (Isr.).

²⁰⁶ DRAFT REPORT, *supra* note 194; U.S. CONST. art. I, § 2, cl. 3 (ratified in 1788).

²⁰⁷ Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 16 (2004) (quoting *In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting)).

²⁰⁸ *Id.* at 17.

²⁰⁹ *Id.* at 18.

²¹⁰ Art. 41 Costituzione [Cost.] (It.).

It is true, however, that in the past decade, dignity has increasingly appeared in U.S. constitutional discourse (as well as in U.S. Supreme Court judicial decisions).²¹¹ Specifically, dignity has been appropriated by conservative Christians in debates concerning reproductive rights and the equality of sexual minorities.²¹² Dignity features prominently in the *Manhattan Declaration*, a manifesto drafted by a prominent conservative Catholic intellectual, Princeton professor Robert George.²¹³ This manifesto was issued in concert by Eastern Orthodox, Catholic, and Evangelical Christian leaders, and it is echoed in Pompeo's draft report. The *Manhattan Declaration* defends three basic moral issues: human dignity connected to the right to life from conception, opposite-sex marriage as a natural institution, and the protection of religious freedom.²¹⁴ Unsurprisingly, the latter is defined in an almost completely unconstrained fashion, as a right against which all other rights and freedoms must be measured. Indeed, the *Manhattan Declaration* refers to the "weaken[ing of] . . . conscience clauses" and to the use of anti-discrimination law to compel religious institutions, businesses, and service providers of various sorts to comply with activities they judge to be deeply immoral or go out of business.²¹⁵ Remarkably, the *Manhattan Declaration* openly vows civil disobedience: "We are Christians who have joined together across historic lines of ecclesial differences to affirm our right—and, more importantly, to embrace our obligation—to speak and act in defense of these truths. . . . that no power on earth, be it cultural or political, will intimidate us into silence or acquiescence. . . . [t]hrough the centuries, Christianity has taught that civil disobedience is not only permitted, but

²¹¹ See AHARON BARAK, *Human Dignity in American Constitutional Law*, in HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 185 (Daniel Kayros trans., 2015).

²¹² See generally Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates Over Abortion and Same-Sex Marriage*, 10 INT'L J. CONST. L. 355 (2012); REVA B. SIEGEL, *Dignity and the Duty to Protect Unborn Life*, in UNDERSTANDING HUMAN DIGNITY 513 (Christopher McCrudden ed., 2013).

²¹³ Robert George, Timothy George and Chuck Colson, *Manhattan Declaration: A Call of Christian Conscience* (Oct. 20, 2009), <https://www.manhattandeclaration.org> [<https://perma.cc/S34B-GXME>].

²¹⁴ *Id.*

²¹⁵ *Id.*

sometimes required.”²¹⁶ A similar position has been advocated by the Archbishop of Canterbury, who refers to:

[T]he reluctance of a dominant rights-based philosophy to acknowledge the liberty of conscientious opting-out from collaboration in procedures or practices that are in tension with the demands of particular religious groups: the assumption, in rather misleading shorthand, that, if a right or liberty is granted, there is a corresponding duty upon every individual to ‘activate’ this whenever called upon.²¹⁷

In this light, freedom of religion should include freedom of conscience, understood as an absolute right not to comply with general laws and policies that go against traditional Christian morality in the fields of sexual and reproductive rights.²¹⁸

This cultural and political surge has paved the way for a systematic attack on fundamental rights in the name of religious freedom, aimed at strengthening the privileges of Christian majorities. Christian public interest law firms—such as the American Center for Law & Justice, the Alliance Defending Freedom, and the Becket Fund for Religious Liberty—systematically intervene in high-profile judicial cases, successfully promoting the notion that religious freedom deserves special treatment at the detriment of other rights.²¹⁹

Countless cases have been litigated before the U.S. Supreme Court concerning, broadly speaking, the special role of religion in American public life. In *Town of Greece v. Galloway*, for example, the U.S. Supreme Court found that the delivery of a Christian prayer at the

²¹⁶ *Id.*

²¹⁷ Rowan Williams, Archbishop of Canterbury, Civil and Religious Law in England: A Religious Perspective, Lecture at the Royal Courts of Justice (Feb. 7, 2008), in 10 *ECCLESIASTICAL L.J.*, 262, 273 (2008).

²¹⁸ Susanna Mancini & Michel Rosenfeld, *Introduction: The New Generation of Conscience Objections in Legal, Political, and Cultural Context*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 1–19 (Susanna Mancini & Michel Rosenfeld eds., 2018).

²¹⁹ See Joshua C. Wilson & Amanda Hollis-Brusky, Lawyers for God and Neighbor: The Emergence of “Law as a Calling” as a Mobilizing Frame for Christian Lawyers, 39 *LAW & SOC. INQUIRY* 416, 427 (2014). Interestingly, Christian Right Public Interest Law Firms increasingly engage in “secular” litigation, motivated by a desire to influence the legal rules rather than the outcome of the particular case. See Amanda Hollis-Brusky & Joshua C. Wilson, *Playing for the Rules: How and Why New Christian Right Public Interest Law Firms Invest in Secular Litigation*, 39 *LAW & POL’Y* 121, 121 (Apr. 2017).

opening of the town board meeting does not violate the First Amendment prohibition of an establishment of religion, because “legislative prayer has become part of our heritage and tradition, part of our expressive idiom”²²⁰ Alliance Defending Freedom represented the Town of Greece from the trial level up through the U.S. Supreme Court. In *Hosanna-Tabor*,²²¹ the Supreme Court recognized a ministerial exception to claims brought under the Americans with Disabilities Act, de facto shielding a religious organization from the application of anti-discrimination law fashioned to protect disabled persons. Moreover, this exception was vastly extended in the most recent *Our Lady of Guadalupe School v. Morrissey-Berru* case²²² where the Court held that a Catholic school could fire two mainly lay teachers who were not required to be Catholic, one because she developed breast cancer and the other because of her age. Not only were the fired teachers not involved in any leading religious position or consequential religious teaching, but they were not fired on grounds contrary to official Catholic doctrine, such as divorce or same-sex partnership. In the pointed words of one of the dissenting justices:

In expanding the ministerial exception far beyond its historic narrowness, the Court[’s] . . . laissez-faire analysis appears to allow . . . employer[s] to make employment decisions because of a person’s skin color, age, disability, sex, or any other protected trait for reasons having nothing to do with religion. This sweeping result is profoundly unfair [The Court] here . . . swings the pendulum . . . permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs. The inherent injustice in the Court’s conclusion will be impossible to ignore for long, particularly in a pluralistic society like ours.²²³

A particularly contentious field is that of conscientious objection, with numerous cases concerning refusals to provide services to women and sexual minorities based on religious objections. These include mass

²²⁰ *Town of Greece v. Galloway*, 572 U.S. 565, 587 (2014).

²²¹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

²²² *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

²²³ *Id.* at 2082 (Sotomayor, J., dissenting).

objection by medical personnel to performing abortions;²²⁴ business owners refusing to provide insurance coverage for contraception for their employees;²²⁵ photo studios and bakers refusing to provide their services to same sex weddings;²²⁶ clerks refusing to issue marriage licenses to same-sex couples;²²⁷ and pharmacies turning away women seeking to buy emergency contraception.²²⁸ Moreover, there has been a proliferation of statutes expanding the scope of religiously motivated exemptions from the application of general laws in the field of reproductive rights. Some of these statutes cover activities that do not require objectors to engage in any direct participation in acts that they deem immoral. For example, the state of Mississippi adopted the United States' broadest health care refusal law in 2004, defining:

“[H]ealth care service” to include “any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or health care institutions.”²²⁹

The attempt to reestablish the hegemony of Christianity through the uncontrolled expansion of religiously motivated claims has taken a

²²⁴ *Doe v. Bolton*, 410 U.S. 179, 197–98 (1973) (“[A] physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure.”).

²²⁵ *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

²²⁶ *See, e.g., the decision by the U.S. Supreme Court in, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

²²⁷ *See, e.g., Miller et al. v. Davis*, No. 15–5961, 2015 WL 10692638 (6th Cir. 2015).

²²⁸ *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *rev’ing* 854 F.Supp. 2d 925 (W.D. Wash. 2012) (reversing the District Court’s holding that Washington state rules requiring pharmacies to deliver and dispense contraceptive drugs were a violation of the Free Exercise and Equal Protection clauses of the First Amendment. The Court of Appeals held that the Washington Rules were operationally neutral and not selectively enforced, and thus did not violate the Free Exercise clause on rational basis review).

²²⁹ Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2539 (2015). Other states, such as Illinois and Mississippi, *inter alia*, have similarly wide-reaching freedom of conscience statutes for healthcare providers. *See* 745 *ILL. COMP. STAT. ANN.* 70/13 (West, current through P.A. 101-651); *MISS. CODE ANN.* §§ 41-107-3, 41-107-5 (2004); *see also Refusing to Provide Healthcare Services*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services#> (last updated Aug. 1, 2020) [<https://perma.cc/7KH2-YBBB>].

new turn since 2014 with the *Hobby Lobby* case,²³⁰ in which the claimants, closely held for-profit corporations, objected to providing their employees' health insurance benefits that covered certain contraceptives (such as the morning-after pill and intrauterine devices that they deemed "abortifacients"), under the Affordable Care Act. The Affordable Care Act, colloquially known as "Obamacare," mandated individual health insurance and employers of a certain size to insure their employees as part of their employment relationship. In particular, this insurance explicitly included an obligation to offer contraceptive coverage to any woman who wished to avail herself of it. This was an important change from the previous insurance arrangement that often denied women the essentials of reproductive health coverage, thus putting women at a disadvantage in obtaining equal access to health care.²³¹ Obamacare sought to remedy these deficiencies, but immediately ignited a heated debate that coalesced libertarian interests set against government intervention and religious interests rigidly opposed to promotion of reproductive rights. The Supreme Court upheld the claim by Hobby Lobby that offering to their employees the required health care substantially burdened their free exercise of religion under the Religious Freedom Restoration Act (RFRA).²³² In her dissenting opinion, Justice Ginsburg stressed, inter alia, how this decision relies on the intelligibility of the claimants' arguments *because of their being rooted in stereotypical notions of gender roles traditionally held by conservative Christians*:

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?²³³

²³⁰ *Hobby Lobby Stores*, 573 U.S. 682.

²³¹ Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 52 (2014).

²³² Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4.

²³³ *Hobby Lobby Stores*, 573 U.S. at 770–71 (Ginsburg, J., dissenting).

Justice Ginsburg dissented again in the most recent *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* case²³⁴ which originated in a claim by nuns engaged in social work activities that the mere completion of a form, requesting to obtain an exemption to providing contraceptive services to their women employees (to which they were legally entitled), made them into accomplices in the commission of sins.²³⁵ Objecting to the Court's decision that upheld federal regulation that reinforced the nuns' position and which could deprive more than 100,000 working women of legally mandated free contraceptives, Justice Ginsburg stressed:

In accommodating claims of religious freedom, this Court has taken a balanced approach, one that does not allow the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs. Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree. Specifically, in the Women's Health Amendment to the Patient Protection and Affordable Care Act (ACA), 124 Stat. 119; 155 Cong. Rec. 28841 (2009), Congress undertook to afford gainfully employed women comprehensive, seamless, no-cost insurance coverage for preventive care protective of their health and well-being. . . . [Today] this Court leaves women workers to fend for themselves [Neither the] Constitution's Free Exercise Clause . . . [nor applicable law] call for that imbalanced result. . . . [Nor does the RFRA] condone harm to third parties occasioned by entire disregard of their needs.²³⁶

Litigation over the scope and the extension of conscientious objection is by no means the monopoly of the United States. European domestic and transnational courts are increasingly targeted by proponents of the return of strong religion, who engage in strategic litigation trying to establish an American-like "reasonable accommodation" system that would shield religious actors from the application of general laws. These efforts are backed by conservative

²³⁴ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2400 (2020) (Ginsburg, J., dissenting).

²³⁵ *Id.* at 2376 (majority opinion) (citing *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1168 (10th Cir. 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016)).

²³⁶ *Id.* at 2400–01 (Ginsburg, J., dissenting) (citations omitted).

Christian American lobbies who have opened offices in several key European venues, such as Brussels and Strasbourg, and/or who generously fund their European allies.²³⁷ Compared to their American counterparts, however, European courts appear definitely less amenable to such arguments. The U.K. Supreme Court has decided various cases in this field and has recently ruled against the widening of conscientious objection to activities not directly related to performing abortions. Thus, in the *Doogan* case, which concerned the claim by Catholic midwives employed as Labour Ward Coordinators who objected to “delegating, supervising and/or supporting staff to participate in and provide care to patients throughout the termination process,” the Court specified that the words “to participate in” an abortion procedure meant “taking part in a ‘hands-on’ capacity” and did not extend to the managerial and supervisory tasks required of a Labour Ward Coordinator.²³⁸ These latter tasks were held to be administrative in nature, and did not therefore amount to taking part directly in bringing about the termination of pregnancy.²³⁹ Importantly, the court noted that conscientious objection is rooted in the idea that a balance exists among conflicting rights and cannot thus override the reproductive rights of women: “[t]he conscience clause was the *quid pro quo* for a law designed to enable the health care profession to offer a lawful, safe and accessible service to women”²⁴⁰ In another case, the U.K. Supreme Court decided that prohibiting hotel keepers from discriminating against homosexuals does not amount to a disproportionate limitation on their right to manifest their religion.²⁴¹ The court noted that homosexuals were long denied the possibility of fulfilling themselves through relationships with others, which “was an affront to their dignity as human beings which our law has now (some would say belatedly) recognised[,]” and that courts “should not underestimate the

²³⁷ See Annicchino, *supra* note 182; see also Claire Provost & Adam Ramsay, *Revealed: Trump-Linked US Christian ‘Fundamentalists’ Pour Millions of ‘Dark Money’ into Europe, Boosting the Far Right*, OPENDEMOCRACY (Mar. 27, 2019), <https://www.opendemocracy.net/en/5050/revealed-trump-linked-us-christian-fundamentalists-pour-millions-of-dark-money-into-europe-boosting-the-far-right> [<https://perma.cc/6LBD-MKCK>].

²³⁸ *Greater Glasgow Health Bd. v. Doogan and Another* [2014] UKSC 68, [2015] 1 AC 640 [19], [38] (appeal taken from Scot.).

²³⁹ *Id.* at 32, 38.

²⁴⁰ *Id.* at 27.

²⁴¹ *Bull v. Hall* [2013] UKSC 73.

continuing legacy of those centuries of discrimination [and] persecution”²⁴² Interestingly, the court forcefully rejected the argument, commonly put forward by advocates of religious freedom as an unconstrained right, that denying Christian businesses the right to discriminate against those who do not live according to their beliefs amounts to the replacement of the “legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the Defendants’ beliefs).”²⁴³ According to the court, this claimed replacement would only make sense if the gay owners of a hotel denied a double room to their would-be guests on the ground of the latter’s Christian beliefs or heterosexual orientation.²⁴⁴

The ECtHR has also been cautious in granting the right to religiously motivated conscientious objection. In the high-profile case of *Ladele*, the Court weighed the religious freedom of a public servant refusing to register same-sex unions and of a therapist refusing to provide relationship counseling services to gay clients against gay rights, and decided that the latter should prevail.²⁴⁵ The Alliance Defending Freedom intervened in these cases, because, as its legal counsel admitted: “Sadly, Americans have become accustomed to lawsuits like this within the U.S., too. Just as ADF fights for religious liberty in those cases, we are also committed to doing the same abroad so bad European precedents don’t spread further in Europe and then across the sea to America.”²⁴⁶

In the recent cases of *Grimmark*²⁴⁷ and *Steen*,²⁴⁸ the ECtHR decided that the Swedish authorities’ decision not to employ midwives who refused to take part in abortion procedures complied with Article 9 of the ECHR. Tellingly, both applicants were represented by Scandinavian Human Rights Lawyers, a partially pro bono Christian

²⁴² *Id.* at 53.

²⁴³ *Id.* at 54.

²⁴⁴ *Id.*

²⁴⁵ *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 215 (joining the appeals from *Ladele v. London Borough of Islington*, [2009] EWCA (Civ) 1357 and *McFarlane v. Relate Avon Ltd.*, [2010] EWCA (Civ) 880).

²⁴⁶ *European Court Allows ADF to Intervene in Multiple UK Religious Discrimination Cases*, ALLIANCE DEFENDING FREEDOM (Aug. 12, 2011), <http://www.adfmedia.org/News/PRDetail/5037> [<https://perma.cc/9L54-M6WW>].

²⁴⁷ *Grimmark v. Sweden*, [2020] IRLR 554.

²⁴⁸ *Steen v. Sweden*, Eur. Ct. H.R., App. No. 62309/17 (Mar. 12 2020), <http://hudoc.echr.coe.int/fre?i=001-201732> [<https://perma.cc/9KP3-UE9V>].

law firm closely associated with the Alliance Defending Freedom, and whose “work is based on Christian values and ethics, human dignity and the principles of natural law.”²⁴⁹ Scandinavian Human Rights Lawyers did not frame the case in terms of conscientious objection rights, but of employment rights, although the dispute obviously focused on the absence, in Swedish law, of a conscientious objection option for medical personnel working in the field of reproductive health. This allowed the applicants to present their anti-abortion position as a progressive argument in favor of workers’ rights.

Although unsuccessful, these cases clearly illustrate how the American international human rights policy accurately reflects the theoretical basis and the political aspirations articulated in Pompeo’s draft report.

D. *An (Un)holy Alliance: The Russian Orthodox Church’s
Partnership with the State to Subvert the International Human Rights
Regime*

Russia cannot be listed among the countries that satisfy democratic standards. Its transition to democracy, which began after the dissolution of the USSR, encountered substantial obstacles, ranging from the lack of a vital civil society to the damaging consequences of a heavily corrupted process of privatization of state assets. This set the conditions for the elites to resist and subvert democratic reforms and paved the way “toward more authoritarian control after 2000.”²⁵⁰ Notwithstanding its “shallow transition,”²⁵¹ however, Russia adheres, in principle, to the ideals of Western constitutionalism: its 1993 Constitution proclaims, at Article 1, that “Russia is a democratic federal law-bound State with a republican form of government”²⁵² and contains

²⁴⁹ *About Us*, SCANDINAVIAN HUM. RIGHTS LAW., <https://humanrightslawyers.eu/about-us> [<https://perma.cc/DA9U-PKW2>].

²⁵⁰ Alfred B. Evans, *The Failure of Democratization in Russia: A Comparative Perspective*, 2 J. EURASIAN STUD. 40, 40 (2011).

²⁵¹ *Id.*

²⁵² KONSTITUTSIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 1 (Russ.).

provisions for guaranteeing rights²⁵³ and for the separation of powers.²⁵⁴ Moreover, the Russian Constitution enshrines secularism, understood as a principle which guarantees strict separation of church and state and equality among religious denominations,²⁵⁵ and provides for a formally ample guarantee of freedom of religion.²⁵⁶

Since 1996, Russia has been a member of the Council of Europe, and, as such, it has ratified the ECHR and accepted the jurisdiction of the ECtHR. It is, however, a troubled membership: according to the latest ECtHR report, Russia has been condemned far more than any other member state for violating the ECHR.²⁵⁷ In particular, Russia is among the countries that are most often condemned for breaching Article 9 of the ECHR, which protects freedom of thought, conscience, and religion.²⁵⁸ Numerous international bodies and NGOs have pointed to the grave and persistent persecution of religious minorities by the Russian authorities.²⁵⁹

²⁵³ See generally *id.* at ch. 2, Rights and Freedoms of Man and Citizen.

²⁵⁴ *Id.* at art. 10 (“The state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial power. The bodies of legislative, executive and judicial power shall be independent.”).

²⁵⁵ *Id.* at art. 14 (“(1) The Russian Federation is a secular state. No religion may be established as a state or obligatory one. (2) Religious associations shall be separated from the State and shall be equal before the law.”).

²⁵⁶ *Id.* at art. 28 (“Everyone shall be guaranteed the freedom of conscience, the freedom of religion, including the right to profess individually or together with other any religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them.”). Russian law additionally criminalizes “public actions expressing overt disrespect for society and committed for the purpose of offending the religious feelings of the believers” UGOLOVNIY KODEKS ROSSIYSKOY FEDERATSII [UK RF] [Criminal Code] art. 148.1 (Russ.).

²⁵⁷ See EUR. CT. HUM. RTS., ANNUAL REPORT 2019 OF THE EUROPEAN COURT OF HUMAN RIGHTS, COUNCIL OF EUROPE 12 (2019), https://www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf [<https://perma.cc/MGB5-9R7F>].

²⁵⁸ *Id.* at 136–37 (surpassed only by Greece and Turkey for the number of art. 9 claims); see also European Convention on Human Rights art. 9, Nov. 4, 1950, E.T.S. No. 005 (entered into force Mar. 9, 1953). (“Freedom of thought, conscience and religion (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”).

²⁵⁹ “Russian authorities continued to persecute minority religious groups groundlessly designated as ‘extremist’ under Russia’s overly broad counter-extremism law, despite no evidence

During the Soviet era, religion was harshly repressed and atheism aggressively promoted. A first step towards the recognition of religious rights occurred in 1990, during *Perestroika*,²⁶⁰ when a law was enacted which:

[P]rohibited the establishment of a state religion, and denied to the state any right of intervention in religious affairs. Churches and other religious organizations were permitted to freely engage in worship and missionary activities, operate schools and seminaries, own property and publish and distribute religious literature, all without the requirement of registering with the government.²⁶¹

This law, which could have paved the way to the flourishing of a religiously pluralist polity, was ill-received by the Russian Orthodox Church (ROC), which saw it as a menace to its position, especially vis-à-vis the competition of more “modern” denominations (in particular Protestant Churches).²⁶²

The Moscow Patriarchate of the ROC sought shelter under the umbrella of the state, with the objective of consolidating its privileged position. The corrupted and delegitimized Russian political elites “recognized the potential in supporting the ROC, an institution perceived positively by the majority of Russians.”²⁶³ This set the premise for a new form of alliance between religion and public power, where the ethical force of the first one upheld the political force of the latter, and vice versa.

A new law was enacted in 1997 reducing the scope of religious pluralism and conferring a special role to the ROC. The Law on the Freedom of Conscience and Religious Associations²⁶⁴ recognized the

that they espoused or committed violence.” See *Russia: Events of 2019*, HUM. RIGHTS WATCH (2019), <https://www.hrw.org/world-report/2020/country-chapters/russia> [<https://perma.cc/HLC9-7Y9P>].

²⁶⁰ See Oliver McTernan, *Religion and Perestroika*, 79 *STUD.: AN IRISH Q. REV.* 18, 20–21 (1990).

²⁶¹ Derek H. Davis, *Russia’s New Law on Religion: Progress or Regress?*, 39 *J. CHURCH & ST.* 645–46 (1997).

²⁶² Alicja Curanović, *The Guardians of Traditional Values: Russia and the Russian Orthodox Church in the Quest for Status*, 1 *TRANSATLANTIC ACAD. PAPER SERIES* 3, 5 (2015).

²⁶³ *Id.*

²⁶⁴ Federal’nyi Zakon RF o Svobodye Sovesti i o Religioznykh Ob’edinenyakh [Federal Law on the Freedom of Conscience and Religious Associations], *ROSSIISKAIA GAZETA* [ROS. GAZ.] [Russian Gazette], Sept. 26, 1997.

“special role” of Russian Orthodoxy in the country’s “history and the formation and development of its spirituality and culture,” and the existence of four “traditional” religions in the Russian Federation—Christianity, Islam, Buddhism, and Judaism. This excluded from recognition all religious communities that had established themselves in Russia after the breakdown of the Soviet Union,²⁶⁵ thus landing a fatal blow to the most challenging competitors of the ROC. This law was the first step in a series of acts that profoundly altered the secular character of the state and the equality among religious denomination proclaimed by the Constitution. The government was given the power to restrict religious rights to protect the constitutional structure and security of the government; the morality, health, rights, and legal interests of persons; or the defense of the country.²⁶⁶ Anti-extremism legislation (the so-called “Yarovaya Laws” adopted in 2016) has further restricted the religious freedom of minority faiths.²⁶⁷ Indeed, this legislation allows state officials to prohibit the activity of a religious association on grounds such as violating public order or engaging in “extremist activity.” The Yarovaya Laws criminalize a broad spectrum of activities as extremist, including “assistance to extremism,” without, however, providing a definition of “extremism” and without requiring that an activity include an element of violence or hatred as a precondition to being classified as extremist.²⁶⁸ These provisions have legitimized the systematic repression of several religious minorities. A 2017 Russian Supreme Court “ruling declared the Jehovah’s Witnesses Administrative Center [to be] an extremist organization, closed the organization on those grounds, and banned all Jehovah’s Witnesses activities, including the organization’s website and all its regional

²⁶⁵ Kristina Stoeckl, *Three Models of Church–State Relations in Contemporary Russia*, in *HANDBOOK ON CONSTITUTIONS AND RELIGION* 243–44 (Susanna Mancini ed., 2020).

²⁶⁶ U.S. DEP’T OF STATE, OFF. OF INT’L RELIGIOUS FREEDOM, 2019 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: RUSSIA (2019), <https://www.state.gov/wp-content/uploads/2020/05/RUSSIA-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf> [<https://perma.cc/6ZRX-V4M7>].

²⁶⁷ Stoeckl, *supra* note 265, at 244–45; *see also* U.S. DEP’T OF STATE OFF. OF INT’L RELIGIOUS FREEDOM, 2016 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: RUSSIA (2016), <https://www.state.gov/wp-content/uploads/2019/01/Russia-3.pdf> [<https://perma.cc/8NPR-9JVH>].

²⁶⁸ U.S. DEP’T OF STATE, RUSSIA 2019 REPORT, *supra* note 266, at 4.

branches.”²⁶⁹ In its ruling, the Court purported to apply some sort of proportionality standard, affirming that freedom of religion is not an absolute right and that it must be balanced against other rights and values, including “existing civil peace and harmony.”²⁷⁰ Starting in the early 2000s:

[T]he Supreme Court has also banned the activities of several Islamic organizations on the grounds of extremism, including Hizb ut-Tahrir in 2003; Nurdzhular (a Russification of the Turkish for “followers of Said Nursi”) in 2008; and Tablighi Jamaat in 2009. In 2015 the Ministry of Justice (MO) added the Fayzrakhmani Islamic community to its Federal List of Extremist Organizations.²⁷¹

The convergence of interests between the Russian political leadership and the ROC is responsible for shaping the country’s international human rights agenda, according to “traditional values.” The ROC has designed its human rights agenda “as an ‘alternative’ human rights discourse, in competition with secular liberal human rights activists”²⁷² Domestically, the ROC aims at preventing any liberalising influence of international human rights on family law.

Indeed, the influence of the ROC is clearly perceivable in numerous areas of fundamental and human rights law other than religious freedom. One of such areas is the regulation of reproductive rights.²⁷³ In 2000, the ROC addressed the issue of abortion in depth in the Foundation of Social Doctrine (Social Doctrine). It did not only raise theological concerns, but also demographic ones, decrying the dramatic decrease in population which followed the fall of the USSR. It thus formulated a twofold strategy with the view of changing the situation of abortion legislation in Russia: on the one hand, it insisted on the need for a broad recognition of conscientious objection (of

²⁶⁹ Tom O’Connor, *Religion in Russia: Jehovah’s Witnesses Declared “Extremist Organization” by Russian Justice Ministry*, NEWSWEEK, Mar. 17, 2017, <https://www.newsweek.com/russia-religion-jehovah-witnesses-declare-extremist-organization-569953> [<https://perma.cc/T5VW-B3UA>].

²⁷⁰ U.S. DEP’T OF STATE, RUSSIA 2019 REPORT, *supra* note 266, at 5.

²⁷¹ *Id.*

²⁷² KRISTINA STOECKL, THE RUSSIAN ORTHODOX CHURCH AND HUMAN RIGHTS 50, 95 (2014).

²⁷³ The following analysis is based on Susanna Mancini & Kristina Stoeckl, *Transatlantic Conversations: The Emergence of Society-Protecting Antiabortion Arguments in the United States, Europe, and Russia*, in THE CONSCIENCE WARS 220, 238–57 (Susanna Mancini & Michel Rosenfeld eds., 2018).

medical personnel as well as of Christian taxpayers not to be forced into compliance with public funding of abortions); and on the other hand, the ROC offered itself as a partner of the state to implement measures that will “align” public morality with the Church’s teachings.²⁷⁴ In the years that followed, the position expressed by the ROC in the Social Doctrine has been developed in public and, specifically in political debates about abortion, in some cases incorporated in the legislative frame.²⁷⁵ In particular, the Russian government proved sensitive to both the analysis and the remedy proposed by the ROC. Indeed, since 2000, Russia has:

1. Created a joint committee of the ROC and the Ministry of Health to devise strategies reducing the numbers of abortions in 2010, which led to:
2. Adopting a new law on public health that
 - a. adds consultation and a waiting period to the procedure of having an abortion and
 - b. gives medical personnel the right to refuse abortions;
3. Seeing the emergence of pro-life charity organizations;
4. Putting forward a legal proposal that makes the consent of male partners obligatory for women to have an abortion;
5. Adopting legislation that forbids advertisement for abortion and “abortive contraceptives”; moreover
6. In 2016, proposed a referendum to abolish abortion in Russia; and
7. In 2016, debated taking abortion off the social health care system.²⁷⁶

Similarly, the ROC’s teaching on homosexuality²⁷⁷ is incorporated into the infamous Russian “gay propaganda” legislation. Indeed, in 2013, Russia “adopted a new federal law, banning the so-called

²⁷⁴ *Id.* at 241.

²⁷⁵ *Id.* at 242–43.

²⁷⁶ *Id.* at 243.

²⁷⁷ Heleen E. Zorgdrager, *Homosexuality and Hypermasculinity in the Public Discourse of the Russian Orthodox Church: An Affect Theoretical Approach*, 74 INT’L J. PHIL. & THEOLOGY 214, 224, 227 (2013).

propaganda of non-traditional sexual relationships among minors.”²⁷⁸ Similar bills had been in place since the early 2000s at the regional level in many parts of Russia, including in its second largest city, St. Petersburg. The Constitutional Court upheld the constitutionality of these laws on the ground that “[t]he family, motherhood and childhood in the traditional interpretation, received from our ancestors, are the values that provide a continuous change of generations, and are conditions for the preservation and development of the multinational people of the Russian Federation, and therefore require a special state protection.”²⁷⁹

Both the anti-reproductive rights legislation as well as the “anti-gay propaganda laws” constitute examples of Russia’s attempt to undermine the universality of human rights by propagating the notion that the interpretation of human rights is contingent upon “traditional values.” Indeed, by enacting the “anti-gay propaganda laws,” Russia refrained—as Justine de Kerf notes—from “flagrantly violat[ing] the ECHR by recriminalizing homosexuality . . . proving that Russia does not wish to alienate itself from the human rights debate, but rather convey a new human rights framework centered on traditional

²⁷⁸ The law introduced Article 6.21 to the Russian Code on Administrative Offences:

“Propaganda of non-traditional sexual relations among minors Propaganda of non-traditional sexual relations among minors expressed in distribution of information that is aimed at the formation among minors of non-traditional sexual attitudes, attractiveness of non-traditional sexual relations, misperceptions of the social equivalence of traditional and non-traditional sexual relations, or enforcing information about non-traditional sexual relations that evokes interest to such relations, if these actions do not constitute a criminal offence, is punishable by an administrative fine for citizens in the amount of four thousand to five thousand rubles; for officials—forty thousand to fifty thousand rubles; for legal entities—from eight hundred thousand to one million rubles, or administrative suspension of activities for the period of up to ninety days.”

KODEKS ROSSIISKOI FEDERATSII RF OB ADMINISTRATIVNYKH [KOAP RF] [Code of Administrative Violations] art. 6.21 (Russ.). For the above English translation, see Justine De Kerf, *Anti-Gay Propaganda Laws: Time for the European Court of Human Rights to Overcome Her Fear of Commitment*, 4 J. OF DIVERSITY & GENDER STUD. 35, 40 (2017).

²⁷⁹ KSENIYA A. KIRICHENKO, THE DANISH INST. FOR HUM. RTS., STUDY ON HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY—LEGAL REPORT: RUSSIAN FEDERATION ¶ 101, https://www.coe.int/t/Commissioner/Source/LGBT/RussiaLegal_E.pdf [<https://perma.cc/J2K5-7LJ2>] (quoted by De Kerf, *supra* note 278, at 39); see also KONSTITUTSIAA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 38(1) (Russ.).

values,”²⁸⁰ formally granting equal rights to homosexuals as long as they do not manifest their identity in public, or, said differently, as long as they stay in the closet.²⁸¹ In 2017, however, the Russian “anti-gay propaganda legislation” was adjudged to be in violation of the right to freedom of expression²⁸² and the prohibition against discrimination²⁸³ by the ECtHR in the case of *Bayev and Others v. Russia*.²⁸⁴ In a “remarkably straightforward and strong-worded” decision,²⁸⁵ the Court rejected the argument put forward by the Russian Government that the provisions were justified to protect the morals, health, and the rights of others, and particularly minors. According to the Court, states are obliged to take into account developments in society such as the inclusion of same-sex relationships within the concept of “family-life;” that there is a clear European consensus about the recognition of individuals’ right to openly identify themselves as gay, lesbian, or any other sexual minority, and to promote their own rights and freedoms; that public health would be better protected with the dissemination of education on single-sex relationships; and that by adopting the “anti-gay propaganda legislation,” “the authorities reinforce[d] stigma and prejudice and encourage[d] homophobia, which is incompatible with the notions of equality, pluralism and tolerance in a democratic society.”²⁸⁶ The Russian judge, Dmitriy Dedov, dissented, arguing that the relevant law should be considered a “positive discrimination . . . to protect the traditional values of Russian society,” and calling on the

²⁸⁰ De Kerf, *supra* note 278, at 40. The criminalization of homosexual conduct is forbidden under the ECHR since the ECtHR’s decision in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A), ¶ 61, 63 (1981), where the Court held that the existence in Northern Ireland of laws which had the effect of making certain homosexual acts committed in private between consenting adult males criminal offences constituted a breach of Article 8 of the Convention.

²⁸¹ De Kerf, *supra* note 278, at 40.

²⁸² ECHR, *supra* note 6, at art. 10.

²⁸³ *Id.* at art. 14.

²⁸⁴ *Bayev and Others v. Russia*, App. Nos. 67667/09, 44092/12 and 56717/12, Eur. Ct. H.R. (2017) <http://hudoc.echr.coe.int/eng?i=001-174422> [<https://perma.cc/5V27-UQ8U>].

²⁸⁵ Pieter Cannoot, *ECtHR Finds Russia’s Gay Propaganda Law Discriminatory in Strong-Worded Judgment*, STRASBOURG OBSERVERS, July 11, 2017, <https://strasbourgoobservers.com/2017/07/11/ecthr-finds-russias-gay-propaganda-law-discriminatory-in-strong-worded-judgment/> [<https://perma.cc/5Z57-4VU2>].

²⁸⁶ *Bayev*, Eur. Ct. H.R., at ¶ 83.

Council of Europe to “respect ‘family relationships as these are traditionally understood in Russia’”²⁸⁷

The cooperation between the Russian government and the ROC does not only pose a major challenge both to the constitutional rights of Russian citizens and to the European human rights regime. In addition, religion has become enlisted as a crucial element of Russia’s foreign policy.²⁸⁸ After the annexation of Crimea in 2014, Putin engaged in a narrative of shared religious and cultural roots to legitimize his intervention:

Everything in Crimea speaks of our shared history and pride. This is the location of ancient Khersones, where Prince Vladimir was baptized. His spiritual feat of adopting Orthodoxy predetermined the overall basis of the culture, civilization, and human values that unite the peoples of Russia, Ukraine, and Belarus.²⁸⁹

The ROC has also become an important international actor. Indeed, exhausted by decades of litigation before the ECtHR, the ROC pursues its interests in the international arena, by seeking conservative allies, such as American right-wing Evangelicals, the Vatican, and other conservative Christian churches. The Russian leadership, for its part, favors a multipolar international system not bound by international human rights law, in order to avoid international interference in its domestic politics.²⁹⁰ This dynamic is clearly perceivable in the climate surrounding the 2011 adoption, by the United Nations Human Rights Council, of a resolution entitled “Promoting human rights and fundamental freedoms through a better understanding of traditional

²⁸⁷ *Id.* at *Protection of the Traditional Family* ¶¶ 2–3 (Dedov, J., dissenting). Judge Dedov’s dissenting opinion attracted widespread criticism for his shameful equation of homosexuality and pedophilia. See Laurens Lavrysen, Bayev and Others v. Russia: *On Judge Dedov’s Outrageously Homophobic Dissent*, STRASBOURG OBSERVERS (July 13, 2017), <https://strasbourgobservers.com/2017/07/13/bayev-and-others-v-russia-on-judge-dedovs-outrageously-homophobic-dissent> [<https://perma.cc/4WQM-Z6AM>].

²⁸⁸ *How Putin Uses Russian Orthodoxy to Grow His Empire*, HERITAGE FOUND. (Feb. 22, 2019), <https://www.heritage.org/europe/commentary/how-putin-uses-russian-orthodoxy-grow-his-empire> [<https://perma.cc/F8CU-EKMV>].

²⁸⁹ *Id.* (quoting Vladimir Putin, Address by the President of the Russian Federation to State Duma Deputies (Mar. 18, 2014), <http://en.special.kremlin.ru/events/president/news/20603> [<https://perma.cc/53SZ-VRT9>]).

²⁹⁰ STOECKL, *supra* note 272, at 113.

values of humankind.”²⁹¹ The resolution was prompted by the Russian Government, which gained the support of the “Global South,” including countries of the Arab League. The resolution echoes the position of the Russian Orthodox Church concerning the foundations and scope of human rights,²⁹² affirming that “Dignity, Freedom and responsibility are Traditional Values,” and that family, community, society, and educational institutions have a fundamental role in maintaining and passing on such values. As Christopher McCrudden notices, in this construction “dignity is seen . . . as having the potential to rebalance international human rights back towards the local and the indigenous, weakening the pull of a homogenizing, universal, and liberal agenda.”²⁹³ Tellingly, the European Union immediately pointed to the “potential harm . . . posed by the concept of traditional values in undermining the universality and inalienability of human rights”²⁹⁴

Hence the resolution can be viewed as part of an attempt by Russia to reaffirm the transcendent foundations of human rights and the role of “religious beliefs in the sphere of norm creation, interpretation and interpretation”²⁹⁵ and as a strategy to further impose itself internationally, as the “leader of the non-West,” with a special role to play in the world’s clash of civilizations.²⁹⁶

CONCLUSION

The repoliticization of religion poses a challenge to institutional secularism but does not in and of itself threaten institutional pluralism or tolerance of a multiplicity of competing conceptions of the good. A joining of forces between believers bent on implementing Catholic social welfare teachings and secular NGOs devoted to the fight against poverty may well lead to desirable improvements within the polity,

²⁹¹ Human Rights Council Res. 16/L.6, U.N. Doc. A/HRC/16/L.6, Promoting Human Rights and Fundamental Freedoms Through a Better Understanding of Traditional Values of Humankind (Mar. 24, 2011).

²⁹² STOECKL, *supra* note 272, at 111.

²⁹³ Christopher J. McCrudden, *Human Rights, Southern Voices, and “Traditional Values” at the United Nations* 12 (Univ. Mich. Pub. Law Research Paper Series, Paper No. 419, 2014).

²⁹⁴ Contribution of the European Union: Traditional Values, European Union Permanent Delegation to the United Nations. Office & Other International Organisations in Geneva (Feb. 15, 2013).

²⁹⁵ McCrudden, *supra* note 293, at 12.

²⁹⁶ Curanović, *supra* note 262, at 11.

while at the same time strengthening mutual respect and mutual recognition through collaboration. More generally, so long as repoliticized religious actors and their nonreligious counterparts can join a common cause based on different reasons and justifications, and so long as points of convergence are commonly emphasized while points of divergence are mutually tolerated and deemphasized in common undertakings, it should be possible to preserve the spirit, if not the letter, of institutional secularism. On the other hand, the repoliticization of religion can often become exclusionary, and, as the above discussion amply illustrates, perhaps even more so when nationalism and populism appropriate religion to go to war against those who are proponents of other religions or who espouse a secular way of life. In the latter cases, it is the very pluralistic ethos essential to the survival of the liberal constitutional order that risks being irreparably set aside. Moreover, what looms as particularly pernicious is that nationalist and populist proponents of repoliticized religion often use the same freedom of speech and freedom from discrimination discourses that have enabled women and LGTBQ individuals, as well as racial, ethnic, and religious minorities, in order to reverse some of the hard-earned gains against oppression and subordination that the latter had obtained after long struggles. As mentioned above, it is by invoking freedom of religion and freedom of conscience that a U.S. corporate employer can today, with U.S. Supreme Court approval, simply revoke the legally provided reproductive rights entitlements of his women employees.²⁹⁷

It must be emphasized that it is exclusionary nationalism and populism that are highly objectionable from a liberal and a pluralist standpoint, and it may well seem secondary whether their grounds for exclusion are based on ethnic origin or on religion. Although that is largely true, there is one sense in which the recourse to religion for exclusionary purposes may be more insidious than its ethnic origin counterpart. This is in relation to the conceptualization and practical application of fundamental rights under constitutions and human rights legal regimes. Because freedom of religion is privileged within its proper domain under the institutional secularism ideal, claims of deprivation of freedom of religion or of discrimination based on religious allegiance or belief tend to be given priority and to be granted significant presumptions of validity. Also, because such claims are often made in

²⁹⁷ See *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014).

relation to transcendent points of reference, they are typically neither subject to verification nor to challenge as to their authenticity or their importance as assessed from any perspective other than the transcendent one from which they are made.²⁹⁸ As against this, claims to privileged status or benefits based on ethnic identity—and particularly based on belonging to a polity’s ethnic majority—are likely to appear inherently suspect within any working liberal constitutional framework.²⁹⁹ In other words, to the extent that claims to ethnic privilege tend to be more transparent than those to religious privilege, it is particularly important in a nationalist or populist context to be able to sort out claims that are ultimately grounded on the appropriation of religion for exclusionary purposes from those that are, ultimately, reflective of plausible worries that certain official undertakings may have anti-religion motivations or consequences in ways that are arguably inconsistent with the dictates of constitutional pluralism.

²⁹⁸ A telling example is that of the nuns engaged in social work services in the *Little Sisters of the Poor* case referred to above. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). The nuns were undoubtedly sincere when they claimed that the mere filling out of a government form indicating that it would violate their religious obligations to provide contraceptive insurance to their women employees, so as to make room for government to arrange for a totally separate alternative, would make them accomplices to sin. From a secular perspective sympathetic to religious freedom, however, it seems odd that a mere declaration that doing something would be a sin is tantamount to a sin, even if a totally independent non-Catholic were subsequently to provide contraceptive insurance to non-Catholic women employees.

²⁹⁹ See *Sejdić v. Bosnia*, 2009-VI Eur. Ct. H.R. 273 (the Dayton Agreement generated a constitutional provision, in the aftermath of violent civil war involving ethnic cleansing, which reserved the country’s presidency for an individual belonging to one of the three formerly warring ethnic groups—namely, Serbs, Croats, and Bosniaks (i.e., Muslims)—was held in violation of ECHR for excluding Jewish and Roma candidates to the presidency).