

GOD, LOCKE AND MONTESQUIEU: SOME THOUGHTS CONCERNING THE RELIGIOUS FOUNDATIONS OF MODERN CONSTITUTIONALISM

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Abstract

Christianity has played an enormously important role in the origins and development of modern constitutionalism. Indeed, Christian principles are enshrined in the most significant documents in Western legal history, including the English *Bill of Rights* (1689) and the *American Declaration of Independence* (1776). First, this paper analyses the profound impact of Christian philosophy on the development of modern constitutionalism. Secondly, this paper discusses the ongoing marginalisation of Christianity in Western societies, explaining how the secular intolerance of our day could constitute a threat to our fundamental rights and freedoms.

I FIRST CONSIDERATIONS

Christianity teaches that God is both Creator and Sustainer. He rules providentially over the world. In that sense, all of life is under law and is best understood as the expression of the will of Jesus Christ, the incarnate Word or Logos, the meaning according to which the world has been created. Western constitutional law was founded upon the idea that laws regulating human society should reflect the eternal wisdom and law of God. In an earlier age people believed that if a human law departed from the divine wisdom it was running against the grain of the universe and was something less than law in its fullest sense. A deviation from law, as Augustine once suggested, is really no law at all. This proposition is fundamental to the way we understand law in the west, even today.¹

—Professor Nicholas Aroney

According to our Western legal tradition, liberty presupposes the existence of laws serving as an effective check against arbitrary power. In the constitutional struggle of parliamentary forces against the Stuarts in seventeenth-century England, the receptive attitude towards Christianity allowed philosophers such as John Locke² to develop a

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¹ Nicholas Aroney, 'Society's Salt' (2008) 608 *Australian Presbyterian*, 5.

² With regard to the kind of Christianity John Locke adhered to, Victor Nuovo provides this insightful information:

Locke's Christianity was strongly messianic, which is to say, he believed that Christian doctrine must be understood as Scripture presents it, embedded in a sacred history that runs from the creation of Adam to the Last Judgement. In this connection, Locke adhered to the doctrine of divine dispensations. The proper place in this history to treat

political theory where the main justification for the state rested on the protection of our most fundamental rights to life, liberty and property.³ In *Second Treatise on Civil Government* (1690), Locke elaborated on a ‘state of nature’ predating the creation of the state in which people were governed not by positive laws but only by a natural law that everybody was able to recognise and uphold. ‘This law of nature’, Locke explained,

stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men’s actions must, as well as their own and other men’s actions, be conformable to the law of nature, i.e. to the will of God of which that is a declaration. And the fundamental law of nature being the preservation of mankind, no sanction can be good or valid against it.⁴

Locke hereby contends that our most basic rights are independent of, and antecedent to, the state. Once it is established, the state ‘hath no other end but the preservation of these rights, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects’.⁵ According to him, the civil ruler puts himself into a ‘state of war’ against society every time he attempts to undermine those basic rights of the individual. Being God-given and inalienable, our basic rights to life, liberty and property *set limits* on governmental power, providing lawful justification for civil resistance against political tyranny should our basic rights be grossly violated. To the extent that the government does not recognise and protect these basic rights, it actually ceases to be a legitimate authority and can be dismissed by the people for breach of trust. As Locke puts it,

Whenever the legislators endeavour to take away and destroy the property of the people [i.e., their rights to life, liberty and property], or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience, and are left to the common refuge which God hath provided for all men against force and violence.⁶

The general belief expressed in the American Declaration of Independence is that ‘all men are created equal and are endowed by their Creator with certain unalienable rights’.

the themes of the *Two Treatises* is prior to the Mosaic theocracy and the founding of the messianic kingdom. The nature and function of the civil state are properly considered, then, only under the general providence of God which prevailed under the Adamic and Noachic dispensations. The counterpart of the *Two Treatises* is *The Reasonableness of Christianity*, whose central theme is the founding of the transcendent Kingdom of God. The difference between the two realms and their respective authorities is a central theme of the *Epistola de tolerantia*.

Victor Nuovo, ‘Review of Jeremy Waldron’s *God, Locke and Equality*’ (2003) *Notre Dame Philosophical Reviews*.

³ In *God, Locke and Equality*, Jeremy Waldron argues that Locke’s political writings present an idea of human equality (and dignity) that is deeply grounded in Christian theology, and that this idea is a ‘working premise’ of his whole political theory’ whose influence is observed, among other things, ‘in his arguments about property, family, slavery, government, politics, and toleration’. – Jeremy Waldron, *God, Locke and Equality: Christian Foundations of John Locke’s Political Thought* (Cambridge University Press, 2002) 151.

⁴ John Locke, *Second Treatise of Government* (c.1681) ch 11, sec 135.

⁵ *Ibid.*

⁶ *Ibid* ch 19, sec 222.

In the American colonies of the eighteenth century, Locke was, after the Bible, ‘the principal authority relied on by the preachers to bolster up their political teachings’.⁷ The colonists viewed their successful revolution as inspired and justified by these Christian principles of natural law. They further aimed to enshrine these very principles in their new system of constitutional government. That these American Founders undeniably drew from such Christian principles during the composition of their Declaration of Independence is well explained by Professor John Eidsmoe:

The Declaration of Independence of 1776 was drafted by a congressional committee consisting of Thomas Jefferson, Benjamin Franklin, Roger Sherman, John Adams, and Robert Livingston. The Declaration clearly states that the united colonies are entitled to independence by the “Laws of Nature and of Nature’s God.” They further declared that “all men are created equal,” and that they are endowed “by their Creator” with certain inalienable rights. They closed by appealing to the “Supreme Judge of the world for the rectitude of [their] intentions,” declaring their “firm reliance on the protection of Divine Providence,” and pledged their lives, their fortunes, and their sacred honor. The “Creator” God they trusted was more than the impersonal and uninvolved god of the deists; the term providence implies a God who continually provides for the human race. And the reference to the laws of nature and of nature’s God reflects their belief in the law of nature and the revealed law described by Blackstone.⁸

Western constitutionalism is therefore founded upon the belief in laws which, according to Sir Edward Coke, ‘God at the time of creation of the nature of man infused into his heart for his preservation and direction’.⁹ This amounts to saying that a legal system without God’s natural law is not protective of liberty but rather of licence. Such a distinction between liberty and licence was one commonly made by natural rights theorists like Locke and Blackstone. In describing the ‘state of nature’, or world without government, Locke contended that ‘though this be a *State of Liberty*, yet it is *not a State of License*’.¹⁰ On this passage, law professor Randy E. Barnett explains that ‘[b]y liberty is meant those freedoms which people *ought to have*. License refers to those freedoms which people *ought not to have* and thus those freedoms which are properly constrained’.¹¹

In his famous *Commentaries*, Sir William Blackstone asserted that ‘God, when he created man, endued him with freewill to conduct himself in all parts of life. He laid down certain immutable laws of human nature whereby freewill is in some degree

⁷ William Molyneux, *Case of Ireland’s being bound by acts of parliament in England stated* (1689) 100. Quoted from JM Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 219.

⁸ John Eidsmoe, ‘Operation Josiah: Rediscovering the Biblical Roots of the American Constitutional Republic’, in H Wayne House (ed.) *The Christian and American Law: Christianity’s Impact on America’s Founding Documents and Future Direction* (Kregel, 1998) 91; Blackstone’s *Commentaries on the Laws of England* was a huge success in America – for many, it was their first comprehensive and clear insight into the English legal system and it was this example which many future American lawmakers modelled their laws upon.

⁹ Sir Edward Coke, *Calvin’s Case* (1608) 7 Coke Rep 12 (a); 77 Eng rep 392.

¹⁰ Locke, above n 4, ch 2, sec 6.

¹¹ Randy E Barnett, *The Structure of Liberty: Justice and The Rule of Law* (Oxford University Press, 1998) 2.

regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws'.¹² This so being, Blackstone also believed that authentic liberty is defined and regulated by eternal or natural laws which everyone is able to discover by 'right reason'. However, if there is no reference point for law, there is also no absolute basis upon which judgement can be made. The result is a noticeable lack of an objective moral standard binding on all individuals and in all circumstances. At worst, law becomes merely what a judge (or a dictator) arbitrarily says it is.¹³

In *Commentaries*, Blackstone also stated that the common law had been established according to both the natural and the revealed law of God: 'On these two foundations, the law of nature and the law of revelation depends all human laws; that is to say, no human law should be suffered to contradict these'.¹⁴ The argument that the natural law is 'dictated by God Himself'¹⁵ echoed the sentiments of his English predecessors. This sentiment, reflecting the inherency of natural law in the common law, was adopted by the American Framers, with their view of common law and natural law developing to virtually echo Blackstone's works.

Blackstone's portrayal of the common law revealed the natural law foundations of American constitutionalism. Accordingly, the acceptance of natural law was faithfully mirrored in the American judiciary, with many of its court members placing their reliance on natural law when adjudicating on matters during the nineteenth century.¹⁶ Within this juridical context, natural law was actively promoted by leading jurists such as Joseph Story, the first Dane Professor of Law at Harvard University and Associate Justice of the United States Supreme Court. Justice Story linked the natural law to the rights of conscience, which 'are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as revealed religion.'¹⁷

As can be seen, Christian jurisprudence has played an enormously important role in the origin and development of modern constitutionalism. The view adopted by the American Founders is that people cannot know the natural moral order and their inalienable rights from their own reasoning unaided by God's revelation. There are, of

¹² Sir William Blackstone, 'Of the Nature of Laws in General', in *Commentaries on the Laws of England*, Vol. I, (Macmillan, 1979) 29-30.

¹³ John W Whitehead, *The Second American Revolution* (Crossway Books, 1988) 80. The relevance of God for the achievement of the Rule of Law was well explained by Locke when he contemplated the final result for society, and even more for liberal democratic society, if there was no acknowledgement of the divine law. The result would be moral anarchy: 'If man were independent [of God] he could have no law but his own will, no end but himself. He would be a god to himself, and the satisfaction of his own will the sole measure and end of all his actions'. –John Locke, *Ethics*, cap.28. Quoted from John Dunn, *The Political Thought of John Locke: A Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge University Press, 1982) 1.

¹⁴ Eidsmoe, above n 8, 90.

¹⁵ Blackstone, above n 12, 39, 41.

¹⁶ *Ibid.*

¹⁷ Joseph Story, *Commentaries on the Constitution of the United States* (William, Gray, and Co, 1833) 1399.

course, those who resist the idea of a supernatural lawgiver because they fear it may lead to intolerance or even theocracy. They have it entirely wrong. For if they are really ‘endowed by their Creator with certain unalienable rights’, they are therefore entitled to preserve these rights no matter their ideological or religious convictions. Conversely, asked Thomas Jefferson, the author of the American Declaration of Independence, rhetorically: ‘How can the liberties of a nation be secure when we have removed their only secure basis, a conviction in the minds of the people that these liberties are a gift of God?’¹⁸

II CHRISTIANITY AND SEPARATION OF POWERS

In the eighteenth century, the scientific works of the English scientist Sir Isaac Newton, especially his discovery of the laws of gravity, were interpreted as strong evidence of the creative genius of God’s handiwork in nature.¹⁹ After all, Newton himself was the first to argue that his scientific discoveries confirmed the existence of a ‘Creator of the universe who certainly is not mechanical ... [but] incorporeal, living, intelligent, omnipresent’.²⁰ According to Newton, ‘this most beautiful system of sun, planets, and comets can only proceed from the counsel and domination of an intelligent and powerful being’.²¹ As a result, Newtonian science laid down the foundations for the investigation of the ‘nature of laws’ in general.

The Frenchman Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, was one those great philosophers of the eighteenth century who sought to extend Newton’s scientific studies to the explanation of the nature of laws as applied to humans as physical beings and their respective societies. He spent nearly two decades writing *L’Esprit des Lois* (‘The Spirit of the Laws’), which was published in 1748 and received its first English translation in 1750. The book soon became enormously popular, most notably amongst Americans during debates over the ratification of the United States Constitution. Those who supported the Constitution and those who opposed it relied heavily on his lessons for their arguments. With the exception of the Bible, Montesquieu’s book was cited more than any other in American political works prior to and following the revolutionary periods of 1760–1805.²² The first chapter of this

¹⁸ Quoted from RJ Rushdoony, *The Politics of Guilt and Pity* (Thoburn Press, 1978) 135.

¹⁹ Newton also stated: ‘God governs the world invisibly, and he has commanded us to worship him, and no other God. ... he has revived Jesus Christ our Redeemer, who has gone into the heavens to receive and prepare a place for us, and... will at length return and reign over us... till he has raised up and judged all the dead’. Quoted from Alvin J Schmidt, *How Christianity Changed the World* (Zondervan, 2004) 232.

²⁰ Quoted from Morris Kline, *Mathematics in Western Culture* (Oxford University Press, 1953) 260.

²¹ Richard Westfall, ‘Isaac Newton’, in Garry Ferngren (ed.), *Science and Religion* (John Hopkins University Press, 2002) 155.

²² See Edward S Corwin, *The Higher Law Background of American Constitutional Law* (1928-1929) (Liberty Fund, 2008) 54. Indeed, as Fareed Zakaria points out: ‘[D]uring the founding of the American Republic “Montesquieu was an oracle”. James Madison, Thomas Jefferson, John Adams, and others consciously tried to apply his principles in creating a new political system. He was quoted by them more than any modern author (only the Bible trumped him).’ Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (NW Norton, 2003) 45.

political treatise was entirely dedicated to the following description of the nature of laws in general:

Laws, in their most general signification are the necessary relations arising from the nature of things. In this sense all beings have their laws...

They who assert that a blind fatality produced the various effects we behold in this world talk very absurdly; for can anything be more unreasonable than to pretend that a blind fatality could be productive of intelligent beings? ...

God is related to the universe, as Creator and Preserver; the laws by which He created all things are those by which He preserves them. He acts according to these rules, because He knows them; He knows them, because He made them; and He made them, because they are in relation to His wisdom and power...

Particular intelligent beings may have laws of their own making, but they have some likewise which they never made. Before there were intelligent beings, they were possible; they had therefore possible relations, and consequently possible laws. Before laws were made, there were relations of possible justice...

We must therefore acknowledge relations of justice antecedent to the positive law by which they are established: as, for instance, if human societies existed, it would be right to conform to their laws; if there were intelligent beings that had received a benefit of another being, they ought to show their gratitude; if one intelligent being had created another intelligent being, the latter ought to continue in its original state of dependence; that an intelligent being who had done harm to another, ought to suffer requital; and so on.²³

Montesquieu saw the natural law as encompassing a superior law instructing humans to distinguish right from wrong, to form their consciences and to guide their actions according to the right path. He argued that human societies also create their own laws, averring that such laws, being the product of mere human will, can be either just or unjust. However, the abuse of positive law is essentially the abuse of authority, and so it does not negate the intrinsic goodness of the natural law. Of all existing laws, Montesquieu contended, the natural law is superior and antecedent to any other law, and the subjection to natural law does not constitute a restriction upon individuals and societies, but it is rather a prerequisite for their healthiest functioning.

Montesquieu, however, acknowledged that positive laws must vary from time to time, from place to place, according to economic, cultural and geopolitical circumstances. This observation does not make of him a legal positivist. Rather, Montesquieu was only commenting on the fact that sociological factors are important to clarify the distinct nature of societies and their particular laws. The legislator must thereby take local habits and customs into account before enacting any positive legislation. The argument that positive laws shall reflect the condition of life of those who live by them earned Montesquieu the deserved title of 'father of legal sociology'.

But it goes without saying that Montesquieu also believed that both the physical natural law and the moral natural law are derived from God. Although the physical world has no other choice but to obey the laws of physics and electromagnetism, humans are free

²³ Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, *The Spirit of Laws* (1750), Book I, ch 1.

to disobey even the laws created by them. Montesquieu acknowledged that, indeed, 'constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go'. To prevent this, he added, 'it is necessary from the very nature of things that power should be a check to power'.²⁴ From here, it can be seen that a vital assumption upon which Montesquieu's notion of separation of powers is based is that humans are sinful, and will inevitably contravene the laws of God. That Montesquieu believed the division of powers to be fundamental to counteract the concentration of power because he regarded people to be inherently corrupt and self-centred, is observed in the following statement:

Man, as a physical being, is like other bodies governed by invariable laws. As an intelligent being, he incessantly transgresses the laws established by God, and changes those of his own instituting. He is left to his private direction, though a limited being, and subject, like all finite intelligences, to ignorance and error...²⁵

Montesquieu's theory of separation of powers rested upon the religious belief that an unrestrained human heart moves towards moral and civil degradation. Therefore it was logical for him to hold that society is safe only if governmental power does not entirely rest in the same body or authority. With the power divided, if one branch were to become corrupt, the others may still be able to check its wayward influence.²⁶ This sinful nature of humans, prominent in the works of Montesquieu, and a central concept in Christianity, not only justifies but necessitates the separation of powers that was adopted by the American Founding Fathers. It therefore comprises a fundamental element of Western constitutionalism.²⁷

²⁴ Ibid Book XI, ch V.

²⁵ Ibid Book I, ch I.

²⁶ See David Barton, *Original Intent* (Wallbuilders, 2005) 215.

²⁷ That Christianity was a main source of inspiration for Montesquieu's doctrine of separation of powers is also made visible by comments such as the following:

The Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the Gospel, is incompatible with despotic rage with which a prince punishes his subjects, and exercises himself in cruelty. As this religion forbids the plurality of wives, its princes are less confined, less concealed from their subjects, and consequently have more humanity: they are more disposed to be directed by laws, and more capable of perceiving that they cannot do whatever they please. While the Mahometan princes incessantly give or receive death, the religion of the Christian renders their princes less timid, and consequently less cruel. The prince confides in his subjects, and the subjects in the prince. How admirable the religion, which, while it seems only to have in view the felicity of the other life, constitutes the happiness of this! ... We owe to Christianity, in government a certain political law, and in war a certain law of nations, benefits which human nature can never sufficiently acknowledge. –Book XXIV, Chap. 3.

And this:

From the characters of the Christian and Mahometan religions, we ought, without any further examination, to embrace the one, and reject the other: for it is much easier to prove that religion ought to humanize the manners of men, than that any particular religion is true. It is a misfortune to human nature, when religion is given by a conqueror. The Mahometan religion, which speaks only by the sword, acts still upon men with that destructive spirit with which it was founded. –Book XXIV, Chap. 4.

III RADICAL SECULARISM AND THE DENIAL OF THE CHRISTIAN LEGAL TRADITION

Unfortunately, it appears to me that the unique contribution of Christianity to the development of Western constitutionalism has been deliberately obscured in more recent times. Despite the historical record, today's Western societies are largely viewed as 'secular', and a general perception appears to suggest that Christian philosophy should have no bearing on the law. As a result, our Christian heritage is almost never mentioned, much less promoted, in the political and intellectual discourse. When it is mentioned among public figures, these principles are often the object of criticism or contempt.

This undeniable anti-religion sentiment has now evolved and is currently used to downgrade the long-established Christian background of Western constitutionalism. Many westerners are now convinced that there should be no relationship between 'religious' values and their countries' legal systems. Were this to be the case, the road would be open not just to the rejection of our Christian heritage but also to the suppression of 'religious' opinion, which would be anything but authentic democracy.²⁸

The idea of an entirely secular public square has achieved significant academic support in western societies.²⁹ The idea is that everyone ought to support their positions about law, politics, and public policy on non-religious grounds.³⁰ This limitation of public debate to only 'neutral' secular rationales is thought necessary to preserve civil discourse. One the most notable proponents of the secular view was the late legal-political philosopher John Rawls,³¹ who advocated that religion cannot be part of the public discourse, for religion involves metaphysical beliefs and positions not capable of rational discussion. Rawls contended that we should 'bypass' religion and try to dialogue on matters of 'overlapping consensus.'³² The legal-political philosopher Ronald Dworkin has articulated the same philosophy when he commented that the liberal state 'must be neutral on ... the question of the good life. ... [P]olitical decisions must be, so far as is possible, independent of any particular conception of the good life.'³³

These proponents of the neutral public square believe that it is possible to detach citizens from their religious convictions, and that their reasoning abilities are capable of being exercised in a religiously neutral manner.³⁴ Behind the secularist approach and

²⁸ See Nicholas Tonti-Fillipini, 'Religion in a Secular Society' (2008) 449 *Quadrant Magazine*, 82–85.

²⁹ Frederick Mark Gedicks, 'Public Life and Hostility to Religion' (1992) 78 *Virginia Law Review* 671.

³⁰ See Stephen L Carter, *The Culture of Disbelief* (Anchor Books, 1994) 54–55.

³¹ See John Rawls, *Political Liberalism* (Columbia University Press, 2nd ed, 2005).

³² *Ibid* 152.

³³ Ronald Dworkin, 'Liberalism', in Stuart Hampshire (ed) *Public and Private Morality* (Cambridge University Press, 1978) 127.

³⁴ See Carter, above n 29, 56. In Chapter 3 of *God, Locke and Equality*, Waldron compares Locke's idea of political equality which is based on Christian philosophy with what he argues to be the inadequacy of Rawls' secular counterpart. Waldron, above n 3, 44-81.

the desire for a neutral, secular public square lies the assumption that traditional religious beliefs are fundamentally subjective, divisive and irrational.³⁵ In large measure this is what explains the radical secularist support for an ‘impregnable’ wall of separation between church and state.³⁶ Since traditional religions are deemed ‘divisive’ and ‘irrational’, radical secularists demand that these religions be limited exclusively to the realm of private conviction.³⁷ Consequently, a citizen’s religious conviction should be ‘privatised’ and excluded from public debate. Cardinal George Pell has commented that the foundations for such ‘secular democracy’ appear to rest upon ‘the invention of a wholly artificial human being who has never existed, pretending that we are all instances of this species.’³⁸

It appears to me that the new form of secular fundamentalism that we have witnessed in more recent times constitutes a radical attempt to redefine what it really means to live in an open and democratic society. As seen above, radical secularism amounts to an unconstitutional attempt to privilege one form of religious discourse over another.³⁹ Although these radical secularists are intent upon eliminating Judeo-Christian traditions, their rejection of religion does not necessarily mean that they have rejected all types of faith. As Cardinal Pell commented in his 2009 inaugural term lecture at Oxford Divinity School, the limited scope that secularists are prepared to concede to traditional beliefs is actually based on their own religious assumption that human beings have created God,

³⁵ Ibid 54–55; Gedicks, above n 28, 693–96. This association of religion with radicalism and bigotry tends to be reinforced by the unfair association of religion in general with the worldwide rise of radical religious nationalistic groups, particularly in the so-called third world, with the corresponding violence that has often occurred. Mark Juergensmeyer, ‘The New Religious State’ (1995) 27 *Comparative Politics* 379.

³⁶ David T Koyzis, *Political Visions and Illusions: A Survey & Christian Critique of Contemporary Ideologies* (InterVarsity Press, 2003) 65–68.

³⁷ See Carter, above n 30, 54–55. See also Michael W McConnell, ‘Religious Freedom at a Crossroads’ (1992) *University of Chicago Law Review* 115, 122-25.

³⁸ Cardinal George Pell, ‘Is There Only Secular Democracy?’ (2004) 412 *Quadrant Magazine* 11. Tonti-Fillipini points out:

It seems... that we are witnessing in Australia... a very aggressive exclusionist form of secularism, which views religious belief and practice with arrogant intolerance and dismissiveness... Notwithstanding the legal position, many politicians and others have behaved in a way that does not respect the Australian Constitution by demanding that bishops, priests, ministers, churches, and other religious bodies stop “meddling” in politics. Such *ad hominem* attacks represent an egregious appeal to prejudice and unjust discrimination against certain people or institutions. It is also hypocritical in the strict sense because such advice is usually given by, but not expected to apply to, those whose religion is variously described as secular, humanist, atheistic, or agnostic. Tonti-Fillipini, above n 28, 82–84.

³⁹ In an instance where “neutrality” was used to make a good point, the Supreme Court warned that ‘a pervasive bias or hostility to religion ... could undermine the very neutrality the Establishment Clause requires.’ *Rosenberger v Rector*, 515 US 819, 839–40, 845–46 (1995). See also *Lee v Weisman*, 505 US 577, 598 (1992) (an ‘all-pervasive attempt to exclude religion ... could itself become inconsistent with the Constitution’). See also R Albert Mohler, *Culture Shift* (Multnomah, 2008) 15-21.

and not that God has created human beings.⁴⁰ Thus, even when secularists presume to have banished ‘religion’ from the public square, they have done no more than to infuse it with their own religious worldview. In other words, they have privatised all religions except their own, which they have actually privileged above all others.

If religion is defined as that which posits a transcendent deity, secular humanism is not a religion. But if religion is defined more broadly, in a way that includes non-theistic worldviews like Buddhism and Confucianism, then this concept certainly applies to secular humanism.⁴¹ Indeed, for purposes of protecting the free exercise of religion, the U.S. Supreme Court has recognized as religious various belief systems that do not include the existence of God. In a famous footnote in *Torcaso v Watkins* (1961), the court listed a number of ‘religions ... which do not teach what would generally be considered a belief in the existence of God,’ including ‘Buddhism, Taoism, Ethical Culture, Secular Humanism, and others.’⁴² Similarly, the High Court of Australia has commented that the definition of religion must not be confined only to theistic religions but that such definition should also include non-theistic religions.⁴³

There is nothing in the written constitutions of Western societies to justify the denial of equal rights to free speech on religious grounds. To the contrary, as mentioned before, Western constitutionalism owes much to the influence of Christianity on its development. The bottom line is that it is utterly impossible to create a religiously neutral public square unless religion is defined in such a way as to exclude certain groups. Indeed, anyone who views the moral obligation of Christians to act according to their own convictions as something that disqualifies them from political life appears to actually be promoting an intolerant form of secular fundamentalism.⁴⁴

Alexander Hamilton, the principal architect of the American Constitution, stated in 1787: ‘The sacred rights of mankind are not to be rummaged for amongst old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature by the hand of divinity itself, and can never be erased or obscured’.⁴⁵ Likewise, the political institutions of Australia are built on Judeo-Christian foundations, ‘notwithstanding the indication of modern secularists to lay claim on them’.⁴⁶ Despite assertions to the contrary, therefore, Western constitutionalism is deeply founded upon

⁴⁰ Cardinal George Pell, ‘Varieties of Intolerance: Religious and Secular,’ *Inaugural Hilary Term Lecture*, Oxford University Newman Society, The Divinity School, Oxford University, March 6, 2008, 7.

⁴¹ As philosopher Roy Clouser has argued in his exhaustive study of the definition of religion. See Roy Clouser, *The Myth of Religious Neutrality* (University of Notre Dame Press/IN, 2nd ed, 2005).

⁴² *Torcaso v Watkins*, 367 US 488, 495 n 11 (1961); and compare *United States v Seeger*, 380 US 163 (1965) (the test for religious belief is whether the belief occupies a place ‘parallel’ to a belief in God).

⁴³ *Church of the New Faith v Commissioner for Payroll Tax* (1983) 154 CLR 120.

⁴⁴ See Cardinal Joseph Ratzinger (Pope Benedict XVI), *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life*, Congregation for the Doctrine of the Faith, London, 2003, 13.

⁴⁵ Quoted from James A Joyce, *The New Politics of Human Rights* (St Martin’s Press, 1978) 7.

⁴⁶ Alan Anderson, ‘Rendering unto God: Revolutionary Secularism and the Campaign to Kick Religion out of Public Life’ (2010) 62(1) *IPA Review* 15.

the general assumption that puts God, not the state, as the ultimate creator of our most fundamental rights. And as the late historian William Orton put it,

The fundamental values of the liberal tradition were in fact exemplified, formulated, and wrought into the texture of Western society by Christianity, not only as a school of thought but as a way of life and feeling: as a religion, in short. It is not safe to assume that the Christian ethos will persist while the faith and doctrine that gave birth are being deliberately abandoned. The logic of thought, the evidence of history, and the testimony of current events are all opposed to that assumption.⁴⁷

IV AN EXAMPLE OF HISTORICAL REVISIONISM: AUSTRALIAN HISTORY CURRICULUM

There is nonetheless a deliberate attempt on the part of some academics and politicians to undermine the values and traditions of Western civilisation. To provide a small example of this, take into account, for instance, the school curriculum that the Australian government has just prepared.⁴⁸ The curriculum covers English, maths, science and history. In history, the curriculum focuses heavily on Australian Aboriginal history and Asian ways of seeing the world while failing to recognise the impact of Western values in shaping Australia's cultural, legal, economic and political development. Rather than acknowledging that this is predominantly a Western nation, in terms of language, legal and political institutions, and history, the document defines Australia in terms of a 'diversity of values and principles'. There is no mention whatsoever of basic concepts such as separation of powers, the Westminster system of government, or significant events in Western history such as the Magna Carta and the English Bill of Rights.

Another incredible omission in this Australian curriculum is that concerning the Christian foundations of Western civilisation. It refers to Christianity only twice, and only in the context of studying other religions, particularly Islam. Here the document deliberately underestimates the significance of Christianity while overestimating any meaningful contribution that Islam may have made. Rather than attempting to project a moral equivalence, the curriculum should ask the students, among other things, to identify the impact of Christianity on the development of human rights and constitutionalism in the West. By way of contrast, the students should be asked to study why Islamic governments have imposed the death penalty as a mandatory punishment against adult converts from Islam.⁴⁹

⁴⁷ William A Orton, *The Liberal Tradition: A Study of the Social and Spiritual Conditions of Freedom* (Yale University Press, 1945) 57.

⁴⁸ Australian Federal Curriculum, *History* (13 October 2010) ACARA Australian Curriculum Consultation Portal <http://www.australiancurriculum.edu.au/Documents/History_curriculum.pdf>.

⁴⁹ Patrick Sookhedo, *Faith, Power and Territory: A Handbook of British Islam* (Isaac Publishing, 2008) 24. Cambridge-based Muddathir 'abd Al-rahim has dismissed arguments for a rethink of the apostasy laws, noting that 'all Muslim schools of thought have been in full and well-founded agreement' about this. 'What the Prophet says' about the treatment of apostates, chided this reviewer, 'cannot ... be simply ignored or wished away'. Review of Saeed & Saeed, *Freedom of Religion, Apostasy and Islam*, by Muddathir 'abd Al-rahim, in *International Journal of Middle East Studies*, Cambridge, November 2005.

But it is not just the importance of Christianity that has been neglected. The proposed curriculum makes not a single reference to the struggles for rights and freedoms prior to the advent of the United Nations, such as that which occurred in Western societies during the 1688 Glorious Revolution in Great Britain and afterwards by American revolutionaries in the eighteenth century. In 1776, thirteen American colonies in their Declaration of Independence broke their ties with England, stating that they were assuming,

among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them. We hold these truths to be self-evident, that all men are created equal, and that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. ... That wherever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government.

For them the whole purpose of human rights was to protect individuals against excessive government power. The proposed curriculum for history completely fails to acknowledge any of these historical facts. It only asks the students to consider the role of the United Nations in promoting and protecting human rights. One doubts whether these students will learn that, ultimately, the United Nations' Universal Declaration of Human Rights (1948) relies very heavily on a Western legal tradition in which our most fundamental rights are not regarded as government-conferred, but rather government-recognised.⁵⁰ Elaborated under the auspices of Eleanor Roosevelt and her commission, when Roosevelt, an avowed Christian, summed up the attitude of the framers of the UN Universal Declaration of Human Rights, she commented that this was 'based on the *spiritual* fact that man must have freedom in which to develop his full stature and through common effort to raise the level of human dignity.'⁵¹ According to Ngaire Naffine, 'the Universal Declaration reflects the natural law view that rights inhere naturally in human beings: rights are not legal constructs as the strict Legalists insist. They are not the product of law, they are not posited into being by law, but rather precede law and indwell in human beings as a natural property'.⁵²

⁵⁰ Of course, one doubts also whether these students will also learn that, ultimately, the United Nations is notoriously corrupt, and that it has developed a tradition of shamefully delaying to respond to human rights violations. Moreover, countries with an appalling human rights record such as China, Cuba, Saudi Arabia, Sudan and Zimbabwe are often elected and re-elected to UN agencies, with Libya, another notorious human rights abuser, even serving as Chairman of the UN Human Rights Commission in 2003.⁵⁰ Surely any decent study of 'the struggle for rights and freedoms' would necessarily have to address these facts. But then I have just said 'decent'. See Brett D Schaefer, 'The United Nations Human Rights Council: Repeating Past Mistakes', *Heritage Foundation*, Lecture N.968, September 6, 2006. See also Brett D Schaefer, 'The United Nations Human Rights Council: A Disastrous First Year', *Heritage Foundation*, Backgrounder No.2038, June 1, 2007. See also Freedom House, *The Worst of the Worst: The World's Most Repressive Societies* (Freedom House, 2007).

⁵¹ 'Statement by Mrs Franklin D Roosevelt', Department of State Bulletin (December 1948) 751. Quoted from Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) 103.

⁵² *Ibid* 102.

V CONCLUSION

A visible fact in these days of postmodernism and multiculturalism is the gradual abandonment of Christian values, principles, and traditions.⁵³ As a result, the religious foundations of modern constitutionalism have been undermined. Indeed, a general belief in God-given laws appears to more authoritatively prescribe and guarantee the inalienability of our most basic rights – rights that are not conferred on us by other human beings and therefore cannot legitimately be denied to us by any human authority. This is why the late Harvard Law Professor Harold J Berman once explained that ‘it is a profound mistake ... to consider the relation of law to religion ... solely in terms of the *legal foundations of religion*. It is necessary also to consider this relation in terms of the *religious foundations of legal freedom*’.⁵⁴ If this is true, it seems to me that it is quite imperative to re-discover these religious foundations that we have so much despised or taken for granted in Western societies.⁵⁵

⁵³ See David Martin Jones, ‘When Ideology Displaces Reason’ (2010) 470 *Quadrant Magazine*, 12.

⁵⁴ Harold J Berman, *Faith and Order: the Reconciliation of Law and Religion* (William B Eerdmans, 1993) 210. (emphasis added). On the imperative of religious freedom as fundamental, not just for believers but for how much freedom there is in a free society, see Michael Casey, ‘Religious Freedom – The Basis of All Our Freedoms’ (2010) 469 *Quadrant Magazine*, 80-83.

⁵⁵ We should also take this advice by Jeffrie G Murphy into consideration: ‘The rich moral doctrine of the sacredness, the preciousness, the dignity of persons cannot in fact be utterly detached from the theological context in which it arose and of which it for so long formed an essential part. Values come to us trailing their historical past; and when we attempt to cut all links to that past we risk cutting the life lines on which those values essentially depend. I think that this happens in the case of ... any ... attempt to retain all Christian moral values within a totally secular framework. Thus “All men are created equal and are endowed by their Creator with certain unalienable rights” may be a sentence we must accept in an all or nothing fashion – not one where we can simply carve out what we like and junk the rest’. Jeffrie G Murphy, ‘Constitutionalism, Moral Skepticism, and Religious Belief’ in Alan S Greenwood (ed), *Constitutionalism: The Philosophical Dimension* (Greenwood Press, 1988) 249.