

RESEARCH ARTICLE

Neutralizing Secularism: Religious Antiliberalism and the Twentieth-Century Global Ecumenical Project

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Abstract

A marked feature of the contemporary U.S. constitutional landscape is the campaign by an Evangelical-Catholic coalition against the idea of secularism, understood by this alliance to mean the exclusion of religion from the state and its progressive marginalization from social life. Departing from the tendency to treat this project as a national phenomenon, this article places it within a longer global genealogy of an earlier international Christian ecumenical effort to combat secularism. The triumph of that campaign culminated in the making of Article 18 of the Universal Declaration of Human Rights, now considered the paradigmatic international legal provision on religious liberty. Article 18's protection of the rights to proselytize and convert, I argue, was a product of an impassioned contestation between an ecumenical movement keen on securing the prerogative to spread the gospel to the non-Christian world and a secularism in a strange alliance with Islam in the region that held the greatest promise for the evangelical enterprise—Muslim Africa. In excavating the genealogy of ecumenical thought as it developed a critique of the so-called secularist threat, I recover the delicate links between the contemporary U.S. anti-secular campaign and the earlier ecumenical efforts.

Keywords: secularism; religious liberty; religious antiliberalism; Article 18 of the Universal Declaration of Human Rights; British indirect rule; global Christian missionary ecumenism; colonial Muslim Africa

Introduction

Religious liberty was a cornerstone of the U.S. Justice Department's agenda under the Trump administration. Perhaps the most well-known articulation of this effort is former attorney general William Barr's 2019 address at the University of Notre Dame.¹ Barr set out the crusade in stark terms: religion is in an existential war with "militant secularism."² This secularist enemy, Barr proclaimed, is the "doctrine of moral relativism." Unleashed on society, moral relativism is not content with personal disenchantment; in Barr's understanding, it instead seeks to deprive the entire society of religion's "moral discipline."³

¹ Attorney General William P. Barr, Remarks at the University of Notre Dame to the Law School and the de Nicola Center for Ethics and Culture (Oct. 11, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics>.

² *Id.* See Katherine Stewart & Caroline Frederickson, *Bill Barr Thinks America Is Going to Hell*, *NEW YORK TIMES*, Dec. 29, 2019, <https://www.nytimes.com/2019/12/29/opinion/william-barr-trump.html>.

³ Barr, *supra* note 1.



Secularism is, therefore, not the absence of religion; it is, instead, a form of “orthodoxy,” a false paganistic faith.⁴ For all the outrage that greeted Barr’s speech, his critique of secularism is certain to survive the departure of the Trump administration, not least because it resonates in sections of the academy. Take two prominent examples: Steven Smith and Adrian Vermeule, have argued, like Barr, that secularism is a false faith on a mission to marginalize true religion.⁵ In this narrative, the siege on faith has culminated in the gradual secularization of society, notably regarding the family, sex, and schools. The result, as Barr declared, has been “moral chaos ... immense suffering, wreckage, and misery.”⁶ Crucially, however, for Barr, secularism’s wins are not merely cultural victories but are devastating attacks “against religion on the legal plane” carried out through a separationist notion of the Establishment Clause. It is, therefore, in law that the secularist enemy becomes a more lethal foe: church-state separation. As the legal expression of the secularist agenda to eliminate religion from society, separationism, argued Barr, seeks to “drive religious viewpoints” from the “public square” and consequently, “impinge on free exercise.”⁷ If the secularist project described by Barr is being executed by organizations such as Americans United for the Separation of Church and State, its philosophical blueprint was laid out in John Rawls’s well-known works on liberal secularism.⁸ The task, Barr declared, is to “resist” this “secularization” project by championing religious liberty.⁹

This resistance is achieving outstanding success. Today, a marked feature of the Supreme Court’s jurisprudence is “religious antiliberalism”—the broad conception of the free exercise of religion and the simultaneous constriction of the constitutional prohibition of church establishment.¹⁰ A survey of the Court’s jurisprudence in the last decade reveals the triumph

⁴ *Id.* Notes Barr, “the secular project has itself become a religion, pursued with religious fervor. It is taking on all the trappings of a religion, including inquisitions and excommunication. Those who defy the creed risk a figurative burning at the stake.” *Id.*

⁵ See STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC (2018); Adrian Vermeule, *Liturgy of Liberalism*, 269 *FIRST THINGS* 57 (2017); see also RUSSELL R. RENO, RESURRECTING THE IDEA OF A CHRISTIAN SOCIETY (2016); Rex Ahdar, *Is Secularism Neutral?*, 26 *RATIO JURIS* 404 (2013). For a critique of Smith, see Richard Schragger & Micah Schwartzman, *Jews, Not Pagans*, 56 *SAN DIEGO LAW REVIEW* 497 (2019). For an analysis of the critique mounted by conservative legal elites on secularism, see Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 *MINNESOTA LAW REVIEW* 1341 (2019). For a critique from the left, see the contributions in *POLITICS OF RELIGIOUS FREEDOM* (Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood & Peter G. Danchin, eds., 2015).

⁶ Barr, *supra* note 1.

⁷ *Id.*

⁸ See JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁹ Barr, *supra* note 1.

¹⁰ Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 5, at 1342–43; see also Brendan Beery, *Prophylactic Free Exercise: The First Amendment and Religion in a Post-Kennedy World*, 82 *ALBANY LAW REVIEW* 121 (2018); Douglas Nejaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 16 (Susanna Mancini & Michel Rosenfeld eds., 2018). On the Establishment side, consider, for instance, *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) (declaring unconstitutional a religious rule disqualifying religious schools from accessing public funding granted to similarly situated secular private schools), and *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (rejecting Establishment Clause challenge to town’s practice of beginning meetings with sectarian and mainly Christian prayers). On the free exercise side, see, for example, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020) (holding it unconstitutional to mandate religious orders to provide contraceptive coverage contrary to their religious beliefs), and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (holding that the Colorado Civil Rights Commission’s actions in assessing a baker’s religiously motivated reasons for refusing to bake a cake for a same-sex wedding had violated the Free Exercise Clause). In those cases that have involved a “play in the joints” between the Establishment and Free Exercise Clauses (see *Locke v. Davey*, 540 U.S. 712, 718 (2004)), notably the ministerial exemption cases, the Supreme Court has construed separation as “noninterference” in the internal governance of religious organizations, consequently, upholding religious liberty. See, most recently, *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049 (2020)

of parties making religious liberty claims.¹¹ Many emphasize that this triumph of religious liberty is not a win for all religions; it is the victory of “the dominant religious tradition.”¹² Richard Schragger and Micah Schwartzman refer to this trend in U.S. constitutional jurisprudence as “Christian Preferentialism,” comparing the favor with which the recent Court has received Christian free exercise claims to its attitude to religious minorities.¹³ This direction of Supreme Court jurisprudence, complemented by the executive branch’s religious freedom agenda, has led another author to announce the onset of “an age of prophylactic free exercise,” one in which Christian religious freedom ranks higher than church-state separation.¹⁴

In what follows, I situate U.S. religious antiliberalism within a longer genealogy—that of the global mission to marginalize secularism and advance Christian religious liberty that culminated in the making of the human right to religious liberty in the aftermath of the Second World War. The actors in that story are familiar: a powerful Protestant coalition—ecumenical and international, yet featuring prominent U.S. Evangelicals—successfully crafted a Christian notion of religious liberty to contest secularism. In particular, ecumenists were concerned about the deployment of secularism by colonial powers, most infamously the British Empire, to frustrate Christian missionizing in the “non-Christian world.”¹⁵ Muslim Africa, long coveted by missionaries, was a major front in this ecumenical struggle. Given the British Empire’s penchant for indirect rule through indigenous institutions, the colonial state governed Muslim Africa through precolonial Islamic institutions. At the same time, however, the state asserted its secularity, insisting that its alliance with Islam was merely instrumental and invoking religion-state separation as its justification for curtailing

(extending the scope of “ministerial exception” to antidiscrimination laws (therefore further expanding the employer immunity from employment antidiscrimination laws first laid down in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012))).

¹¹ See *Hosanna-Tabor Evangelical Lutheran Church and School*, 565 U.S. 171; *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014); *Town of Greece*, 572 U.S. 565; *Holt v. Hobbs*, 574 U.S. 352 (2015); *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores*, 135 S. Ct. 2028 (2015); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Masterpiece Cakeshop*, 138 S. Ct. 1719; *Sause v. Bauer*, 138 S. Ct. 2561 (2018); *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019); *Espinoza*, 140 S. Ct. 2246; *Our Lady of Guadalupe School*, 140 S. Ct. 2049; *Little Sisters of the Poor*, 140 S. Ct. 2367; *St. James School v. Biel*, 140 S. Ct. 2017 (2020); *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020). Only in two cases did the religious side lose: *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding the Presidential Proclamation of the Muslim ban), and *Dunn v. Ray*, 139 S. Ct. 661 (2019) (dismissing a challenge to Alabama’s refusal to permit an Islamic clergyman to be present for the execution of a Muslim prisoner in place of the Christian chaplain usually present.).

¹² Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA LAW REVIEW 833, 854–55 (1996) (reviewing STEPHEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995), and NAOMI W. COHEN, *JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY* (1992)) (“For most of the last two millennia, Christians have maintained a position of hegemonic domination in Western society.”).

¹³ Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 5, at 1347. Schragger and Schwartzman cite the decisions in *Trump v. Hawaii* and *Dunn v. Ray* as examples of this attitude toward minorities. See further Erwin Chemerinsky & Barry P. McDonald, *Eviscerating a Healthy Church-State Separation*, 96 WASHINGTON UNIVERSITY LAW REVIEW 1009 (2018); Beery, *supra* note 10; Aaron E. Schwartz, *Dusting off the Blaine Amendment: Two Challenges to Missouri’s Anti-Establishment Tradition*, 73 MISSOURI LAW REVIEW 129 (2008). This is not to deny that the Supreme Court has extended religious freedom protections to religious minority groups in some cases, including most recently in *Tanzin v. Tanvir*. *Tanzin*, 148 S. Ct. at 493 (holding that federal agents can be sued for damages in their individual capacity for violating religious liberties of the Muslim petitioners as guaranteed by the Religious Freedom Restoration Act). However, the overall tenor of the Court’s jurisprudence is to privilege the predominant religious tradition. See Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 5, at 1402.

¹⁴ Beery, *supra* note 10.

¹⁵ WORLD MISSIONARY CONFERENCE, REPORT OF THE WORLD MISSIONARY CONFERENCE COMMISSION I: CARRYING OF THE GOSPEL TO ALL THE NON-CHRISTIAN WORLD (1910).

Christian missionary activity. The colonial state contended, in essence, that secularism was congruent with governance through Muslim institutions.¹⁶

Ecumenists regarded this duality—the state’s governance through Islamic institutions, and the state’s invocation of a secularist notion of religion-state separation as a justification for prohibiting missionary activity—as a coherent constitutional arrangement. Far from contradictory, Islam and secularism were, in fact, characterized as complementary in ecumenical discourse. As though to foreshadow Barr, ecumenists regarded secularism not as the absence of religion but rather as the state’s separation from true religion. Secularism could, therefore, coexist with false orthodoxy, in this case, Islam. Yet, that same unchristian separation, ecumenists argued, had robbed state and society of its Christian glory.¹⁷ Their response, prescient of the Barr agenda, was to craft a Christian preferentialist notion of religious liberty. This Christian notion of religious liberty was encapsulated in Article 18 of the Universal Declaration of Human Rights, which has since come to be regarded as the paradigmatic modern international religious liberty provision.¹⁸ Article 18 was, in sum, the product of an impassioned contestation between a Protestant ecumenical movement keen on securing a prerogative to carry the gospel to all the “non-Christian world”¹⁹ and a secularism in a strange alliance with Islam. I excavate the genealogy of that contestation. In doing so, my goal is not to eclipse the specificity of the anxieties behind the national struggles over religion and religious difference. Rather than a straightforward historical progression, this genealogical account is, after all, one of both unmistakable continuities and striking reversals. My intent is to make a case for a close study of the encounters that galvanize the constitutional ideas of religious liberty and secularism without losing sight of what global connections reveal about law’s complex relationship with faith and power.

Critiquing Unchristian Separations: Edinburgh 1910 and the Early Ecumenical Roots of Religious Liberty

Gathering at the inaugural moment of modern global ecumenism in June 1910, the World Missionary Conference deliberated over the fate of proselytization in the “non-Christian world.”²⁰ For the ecumenical leaders gathered at Edinburgh, proselytization was the culmination of Evangelicalism’s spiritual premise, “that Christ died for the world,” into a

¹⁶ With its allowance for governance through indigenous religious institutions, the colonial state’s notion of secularism, clearly deviates from conventional philosophical understandings of secularism, which identify religion-state separation as the central element of a secularist polity. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 8; see also RAWLS, *A THEORY OF JUSTICE*, *supra* note 8; BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); DONALD EUGENE SMITH, *INDIA AS A SECULAR STATE* (2015). Yet, the British Empire’s assertion of its secularity is not implausible under critical accounts. Ran Hirschl’s *Constitutional Theocracy*, for instance, suggests that rather than separation, degrees of state-religion entanglement characterize secular states. See RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010); JOAN W. SCOTT, *THE POLITICS OF THE VEIL* (2009). See also Saba Mahmood & Peter G. Danchin, *Immunity or Regulation? Antinomies of Religious Freedom*, 113 *SOUTH ATLANTIC QUARTERLY* 129 (2014); Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom?*, 49 *MCGILL LAW JOURNAL* 635 (2003); Alfred C. Stepan, *The World’s Religious Systems and Democracy: Crafting the Twin Tolerations*, 11 *JOURNAL OF DEMOCRACY* 37 (2000); CHARLES TAYLOR, *A SECULAR AGE* (2007).

¹⁷ *Additional Report of the Section on Church and State*, in *THE OXFORD CONFERENCE (OFFICIAL REPORT)* 224–55 (Joseph H. Oldham ed., Willett, Clark & Co., 1937).

¹⁸ See MALCOLM D. EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* (2008). For the significance of the postwar moment in molding modern notions of human rights, see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001). *But see* SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2012).

¹⁹ *REPORT OF THE WORLD MISSIONARY CONFERENCE COMMISSION I*, *supra* note 15.

²⁰ *Id.* See BRIAN STANLEY, *THE WORLD MISSIONARY CONFERENCE, EDINBURGH 1910* (2009). Although earlier international ecumenical conferences had convened in 1898 and 1900, the 1910 gathering is regarded as the defining moment of Protestant ecumenism.

project—“the world must be changed for Christ.”²¹ It was in pursuit of this project that the conference commenced the task of envisioning a governance design that would be conducive to this missionary enterprise. The deliberations of the commission empaneled by the conference to ponder the question of mission-government relations revealed the beginnings of twentieth-century ecumenical thought on religion-state design in the context of missionizing to the non-Christian world.²²

The Edinburgh view started from the premise that European governments were “Christian;” at the same time, however, ecumenists regarded the complete fusion of church and state as a feature of “non-Christian” states.²³ “Christ,” Reverend Professor G. Hausseleiter of the University of Halle and author of the commission’s study argued, “drew” a “distinction between the Kingdom of the Emperor and the Kingdom of God.”²⁴ Nevertheless, this relationship between the two spheres was not one of separation since Caesar’s sphere is not free of God.²⁵

The Edinburgh conference report, therefore, espoused a hostility to ungodly separation arrangements. To trump ungodly separations, the report declared the superiority of the principle of the “freedom of the church and mission.” As Hausseleiter argued, freedom of the church and mission is “in the interest of the state” since both are the “conscience of the state.” Beyond this state-interest rationale for the superiority of the church and mission freedom principle, the case for the supremacy of the freedom of church and mission also hinged on suspicion of the state. If states are vested with the sole discretion to determine the place of the mission, Hausseleiter posited, they would invoke the principle of state-mission separation to “try everywhere completely to exclude the Mission.”²⁶

Hausseleiter’s religion-state model was not an abstract guide; it was articulated in the context of ecumenical frustration with imperial powers’ invocation of the principle of state-mission separation to justify restrictions on missions. Of these, the case of the British Empire in Muslim Africa was a source of particular concern. In those colonies, the British Empire’s assertion of religion-state separation—the central element of the imperial governance idea of secularism—was complemented by its utilization of Islamic institutions to govern the indigenous population.²⁷ Yet, ecumenists hardly regarded the alliance of secularism and Islam as paradoxical; as ecumenical thought laid out with greater clarity in later years, secularism was not separation from all religion, it was separation from Christianity.²⁸ It was, in essence, an unchristian separation. This governance design that allied empire with indigenous institutions while espousing empire’s distance from Christian missions had first emerged in mid-nineteenth-century British India.

²¹ TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 62 (2003). See also JAN H. BOER, MISSIONARY MESSENGERS OF LIBERATION IN A COLONIAL CONTEXT: A CASE STUDY OF THE SUDAN UNITED MISSION 205 (1979); Andrew E. Barnes, “The Great Prohibition”: The Expansion of Christianity in Northern Nigeria, 8 HISTORY COMPASS 440 (2010).

²² See WORLD MISSIONARY CONFERENCE, REPORT OF THE WORLD MISSIONARY CONFERENCE COMMISSION VII: MISSIONS AND GOVERNMENTS (1910).

²³ *Id.*, appendix E, at 142.

²⁴ *Id.* (citing Matthew 22:21).

²⁵ “[I]t is God who declares what is Caesar’s.” *Report of the Section on Church and State*, in THE OXFORD CONFERENCE (OFFICIAL REPORT), *supra* note 17, at 70. I discuss several reports from the Oxford conference below, in the section headed “Contesting ‘Secularism’ and ‘Islamic Orthodoxy.’”

²⁶ REPORT OF THE WORLD MISSIONARY CONFERENCE COMMISSION VII, *supra* note 22, at 143.

²⁷ On the origins of British imperial secularism, see PETER VAN DER VEER, IMPERIAL ENCOUNTERS: RELIGION AND MODERNITY IN INDIA AND BRITAIN 16–20 (2001); NANDINI CHATTERJEE, THE MAKING OF INDIAN SECULARISM: EMPIRE, LAW AND CHRISTIANITY, 1830–1960 6–9 (2011); CATHERINE S. ADCOCK, THE LIMITS OF TOLERANCE: INDIAN SECULARISM AND THE POLITICS OF RELIGIOUS FREEDOM (2013). On British Nigeria, see Rabiat Akande, *Secularizing Islam: The Colonial Encounter and the Making of a British Islamic Criminal Law in Northern Nigeria, 1903–58*, 38 LAW & HISTORY REVIEW 459 (2020); BRANDON KENDHAMMER, MUSLIMS TALKING POLITICS: FRAMING ISLAM, DEMOCRACY, AND LAW IN NORTHERN NIGERIA (2016).

²⁸ I discuss this below, in the section headed “Contesting ‘Secularism’ and ‘Islamic Orthodoxy.’”

British Imperial Secularism

By several accounts, strains of the constitutional idea of secularism began to emerge in the British Empire in the mid-nineteenth century.²⁹ The 1857 mutiny in British India, understood as a rebellion of the colonized against the empire's civilizing project, was the immediate catalyst.³⁰ That revolt led the colonial state to abandon cooperation with missions and turn to governance through indigenous institutions.³¹ By announcing a commitment to the religious freedom of colonial subjects, Queen Victoria's 1858 declaration of religious and cultural autonomy complemented the imperial turn from the pursuit of "civilization" to embracing indigenous ways.³² Consequently, the classical feature of liberal secularism, the state's separation from religion, was enacted—at least in the formal sense. Although missionary pressure soon induced the state to begin insisting on some distance from indigenous religions—even while it continued to govern through those institutions—missionary advocates were hardly committed to religion-state separation per se. What missionaries desired was a return to their original alliance with the state, the ultimate expression of the freedom of the church and mission. It was when that bid failed that they sought the barest minimum: empire's equal distance from all religions.³³ Although native institutions continued to be instrumental for the purpose of administering the territory, the empire, nevertheless, began to espouse secularism as a statecraft principle for managing religious difference.³⁴ Invoked not only directly but also through a variety of ideas—neutrality, tolerance, impartiality—secularism's essence of avowing religion-state distance had come to be embedded in colonial thought and policy. The working out of this constitutional idea came to be tied to the peculiarities of local colonial governance practices; yet one of its clearest articulations across the empire was the colonial state's dissociation from missions.

By the time the English prime minister Lord Robert Gascoyne Cecil delivered the keynote at the bicentennial of the Church of England's Society for the Propagation of the Gospel in Foreign Parts on June 19, 1900, this mission-empire separation policy had been crystalized. Lord Cecil sought to explain the rationale for this colonial policy to his missionary audience: empire-missionary alliance, Cecil argued, was bad, both for missionaries and the British government. It detracted from the missionary enterprise because it diminished "the purely spiritual aspect and action of Christian teaching" and hurt the government by representing that it was partial to missionary interests. Since Cecil was delivering his speech while the

²⁹ KARUNA MANTENA, *ALIBIS OF EMPIRE: HENRY MAINE AND THE ENDS OF LIBERAL IMPERIALISM* (2010); MAHMOOD MAMDANI, *DEFINE AND RULE: NATIVE AS POLITICAL IDENTITY* (2012); VAN DER VEER, *supra* note 27; CHATTERJEE, *supra* note 27.

³⁰ Although the causes of the mutiny were undoubtedly varied, senior administrators commonly understood the rebellion as inspired by resentment of anglicizing policies that disregarded indigenous religious and cultural values. This understanding came to inspire the empire's response. See MAMDANI, *supra* note 29.

³¹ For pre-mutiny attitudes to missions, see Ian Copland, *Christianity as an Arm of Empire: The Ambiguous Case of India under the Company, c. 1813–1858*, 49 *HISTORY JOURNAL* 1025 (2006). But see BRIAN STANLEY, *THE BIBLE AND THE FLAG: PROTESTANT MISSIONS AND THE BRITISH EMPIRE IN THE NINETEENTH AND TWENTIETH CENTURIES* (1990). The civilizing effort was, however, never completely extinguished and there remained colonial administrators who continued to espouse the civilizing goal and within the scope of their administrative duties worked to further that goal. See Akande, *supra* note 27.

³² "We declare it our Royal will and pleasure that none be in anywise favored, none molested or disquieted, by reason of their religious faith or observances, but that all shall alike enjoy the equal and impartial protection of the law; and we do strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with the religious belief or worship of any of our subjects on pain of our highest displeasure." Proclamation, by the Queen in Council, to the Princes, Chiefs and people of India (published by the Governor-General at Allahabad, November 1st 1858), British Library, London, IOR/L/PS/18/D154.

³³ VAN DER VEER, *supra* note 27; CHATTERJEE, *supra* note 27; ADCKOCK, *supra* note 27.

³⁴ VAN DER VEER, *supra* note 27.

Boxer Rebellion, noted for its widespread attacks on missionaries, was ongoing in China, the prime minister was quick to cite the Chinese example: “You observe that all the people slaughtered [by the Chinese] are Christian. Do you imagine that they are slaughtered simply because the Chinese dislike their religion? There is no nation in the world so indifferent on the subject of religion as the Chinese. It is because they and other nations have got the idea that missionary work is a mere instrument of the secular government in order to achieve the objects it has in view. That is a most dangerous and terrible snare.”³⁵

Missions, Empire, and Islamicate Africa

Given this long history of British imperial secularism, Edinburgh ecumenists understood that Islam was not the only religion being privileged by the British Empire to the disfavor of Christianity. In fact, the missionary experience in India was also a matter of deliberation at the conference, and Edinburgh deliberations reflected a disapproval of all unchristian separations. Islam, however, remained central to this critique. Indeed, while the commission concluded that the jury was still out on the India case, it was unequivocal that Islam was emblematic of the unfriendly religion-separation promoted by the British government.³⁶

Ecumenists’ preoccupation with Muslim Africa was undoubtedly tied to the allure of both Islam and Africa to the missionary enterprise. Islam had long been dominant in the missionary project and African Islam was a uniquely formidable challenge. As Thomas Prasch put it: “For the late-Victorian missionary enterprise, Islam represented the quintessential Other: the faith that was most resistant, most competitive. And for Victorians, Africa was the obvious arena of contention, the blankest continent on the imperial map.”³⁷ That missions regarded Islam as a competitor in this campaign for souls only heightened the attraction of the African Evangelical mission. As the Edinburgh report acknowledged, “the ubiquitous and rapid advance of Islam is the great challenge to urgency in the evangelization of Africa.”³⁸

Three territories were of “extreme concern” to ecumenists—the British colonies of Sudan, Egypt, and Northern Nigeria.³⁹ The mission-minded churchmen found the case of Northern Nigeria particularly troubling. The convener of the Edinburgh conference, Joseph H. Oldham, was no stranger to the mission question in Northern Nigeria. Oldham, a Scottish missionary of the Church Missionary Society⁴⁰ and founder of the first international ecumenical Protestant group,⁴¹ was an ardent advocate for missions struggling to access the Northern Nigeria mission field. Northern Nigeria was home to Sokoto, the renowned caliphate of precolonial Africa, and continued to be widely regarded as one of the most orthodox Islamic polities in the first half of the twentieth century.⁴² Writing of Northern Nigeria’s legal system, J. N. D. Anderson, Christian missionary, foremost Western Islamic law expert, and professor at the School of Oriental and African Studies in London observed: “At present ... Islamic law is more widely, and in some respects, more rigidly applied in Northern

³⁵ *Lord Salisbury and Foreign Missions*, *TIMES*, June 20, 1900, at 10b.

³⁶ REPORT OF THE WORLD MISSIONARY CONFERENCE COMMISSION VII, *supra* note 22, at 24.

³⁷ Thomas Prasch, *Which God for Africa: The Islamic-Christian Missionary Debate in Late-Victorian England*, 33 *VICTORIAN STUDIES* 51 (1989).

³⁸ REPORT OF THE WORLD MISSIONARY CONFERENCE COMMISSION I, *supra* note 15, at 207.

³⁹ *Id.*

⁴⁰ This operated under the Church of England’s Society for the Propagation of the Gospel in Foreign Parts.

⁴¹ Known as the International Missionary Council, it was a product of the 1910 World Missionary Conference and later became the international ecumenical movement’s division focused on global missionary affairs in Asia and Africa.

⁴² See, e.g., NORMAN ANDERSON, *ISLAMIC LAW IN AFRICA* 219 (2013).

Nigeria than anywhere else outside Arabia ... orthodoxy ... has been preserved first by a century of virtual isolation and then by half a century of colonial administration.”⁴³

Anderson’s assessment was hardly inch-perfect since colonial indirect rule did not conserve the precolonial caliphal theocracy. In fact, European administrators’ description of the Muslim chiefs as “secular chiefs” through whom the state governed was a subtle reference to the radical colonial reform of caliphal institutions.⁴⁴ Nevertheless, the state was entangled with caliphal institutions in ways that privileged those institutions relative to those of other faiths. Notably, the empire turned a blind eye to precolonial religious diversity and multiple state formations and governed the now united territory through its caliphal intermediaries.

The colonial policy restricting Christian missions was closely tied to this governance arrangement: missions were prohibited from proselytizing in areas with Muslim populations, which effectively kept the project of the gospel out of large swaths of the territory. The result was that missionary efforts bore little fruit; when the 1952 census was conducted more than five decades after the commencement of missionary activity, it merely confirmed what missions feared: Christians were a mere “sprinkling” of the population, at 2.3 percent.⁴⁵ Muslims, however, remained the majority at 73 percent and adherents of diverse indigenous non-Muslim religions, constituted 24.13 percent.⁴⁶

Placing the blame for the dismal performance on the colonial religion-state design, Edinburgh 1910 declared it “a disgrace to British rule in tropical Africa that it should anywhere favor Islam and discourage the extension of Christian missions.”⁴⁷ Conference delegates accused the British colonial government of enacting religion-state separation to the benefit of Islam and simultaneously, to the disfavor of the Christian missionary enterprise. The misfortune in Muslim Africa was, therefore, not merely the British Empire’s separation from Christian missions; it was also its alliance with Islam. In particular, Edinburgh 1910 delegates were concerned with the obstructive effect of the classical Islamic legal doctrine of *ridda* (apostasy) on missionary proselytization efforts.

Religious faith and citizenship were closely intertwined in the Islamic polities that raised ecumenical concerns.⁴⁸ Non-Muslims were levied *jizyah*, a tax symbolizing their acceptance of the sovereignty of the Islamic state—and an equivalent of the *zakat* levied on Muslims. Like the political-cum-legal doctrine governing religious difference, the classical legal doctrine of apostasy (*ridda*) was symptomatic of the nexus between faith and citizenship.⁴⁹ In a state

⁴³ *Id.*

⁴⁴ Colonialism altered the precolonial relationship between jurists and political authorities—from their precolonial prerogative of expounding the law, jurists came to apply the interpretation of the law communicated by emirs who were themselves communicating the wishes of colonial administrators. Therefore, law-making prerogative resided in the colonial state. See Akande, *supra* note 27. See also Asifa Quraishi-Landes, *Islamic Constitutionalism: Not Secular, Not Theocratic, Not Impossible*, 16 *RUTGERS JOURNAL OF LAW & RELIGION* 553, 559 (2014).

⁴⁵ Sir Kenneth G. Grubb, *London Conference Faces Problems*, CHURCH OF ENGLAND NEWSPAPER, May 31, 1957.

⁴⁶ 1952 CENSUS: NIGERIA FEDERAL GOVERNMENT PRINTERS (1952). This was in contrast to the missionary success in Southwestern and Eastern regions of the country, which did not have a predominant Muslim population in precolonial years. The 1952 Census put Christians in Eastern Nigeria at 50 percent, animists at 49.6 percent, and Muslims at 0.3 percent. Southwestern Nigeria, which had a sizable Muslim population in precolonial years but lacked the organized caliphal structure of the North, was recorded to have a 36.9 percent Christian population, 32.8 percent Muslim population, and 30.3 percent espousing diverse indigenous religious affiliations.

⁴⁷ See, e.g., REPORT OF THE WORLD MISSIONARY CONFERENCE COMMISSION I, *supra* note 15, at 113.

⁴⁸ ABDULLAHI AHMED AN-NA’IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1996). See also MUHAMMAD AL-MUBARAK, NIZAM AL-ISLAM: AL-HUKM WA AL-DAULAH (1997); F. H. Ruxton, *The Convert’s Status in Maliki Law*, 3 *MUSLIM WORLD* 37 (1913).

⁴⁹ An-Na’im argues, “For a Muslim to abandon belief in Islam ... was tantamount to treason in the modern sense of the term.” Abdullahi Ahmed An-Na’im, *Introduction: Competing Claims to Religious Freedom and Communal Self-Determination in Africa*, in *PROSELYTIZATION AND COMMUNAL SELF-DETERMINATION IN AFRICA* 15–16 (Abdullahi Ahmed An-Na’im

where religion was the basis of citizenship, to renounce one's religion was tantamount to shedding oneself of the obligations of citizenship to the state and akin, according to some scholars, to the modern doctrine of treason.⁵⁰ The major Sunni schools of Islamic jurisprudence prescribed both civil and criminal legal consequences for *ridda*, including in some instances, the capital penalty.

It is, therefore, hardly surprising that the critique of the doctrine of *ridda* came to feature prominently in international ecumenical deliberations on the legal design of a religious freedom provision that would liberate the missionary enterprise. Edinburgh initiated this ecumenical censure, and later ecumenical gatherings intensified the critique. In fact, ecumenical deliberations glided over the nuances in the doctrine, including its de facto defunct status, in some precolonial Muslim states, including the much-abhorred Sokoto caliphate. Even beyond the confines of Sokoto, Muslim jurists disagreed over whether it applied beyond early and medieval Islamic polities and whether it was generally applicable to all Muslims. For example, a strand of Maliki jurisprudence, the dominant school of thought in large swaths of Africa, argued that the capital penalty was only applicable where the convert had been a "good Muslim."⁵¹ Who a "good Muslim" was, was hardly settled. Eventually, the capital penalty for *ridda* fell into desuetude, long before colonial rule.⁵² And even though the colonial state codified a version of Maliki jurisprudence, meaning that *ridda* was technically on the books,⁵³ no criminal penalty for *ridda* was ever applied. Nevertheless, colonial administrators invoked Islamic law and societal aversion to conversion as the basis for public order regulations prohibiting proselytization by missionaries.⁵⁴ By construing public order with reference to Islamic law and Muslim attitudes, administrators deployed an ostensibly neutral value to privilege the religious majority to the detriment of Christian missions.⁵⁵

Castigating the constraints on proselytization as "the Great Prohibition," missionaries insisted that empire's religion-state design infringed on their primary obligation to spread Christianity to the "non-Christian world."⁵⁶ Missionaries were, however, convinced that they were in a struggle not only with a constitutional idea organizing the empire. They understood the constitutional arrangement espousing the empire's separation from Christian missions to be rooted in the unchristian lives of colonial administrators. Missionaries, for example, commonly criticized administrators for being "utterly ungodly, all living loose lives, all having women brought to them wherever they are."⁵⁷ Consequently, missionaries

ed., 2009). See AN-NA'IM, *supra* note 48; Intisar A. Rabb, *Negotiating Speech in Islamic Law and Politics: Flipped Traditions of Expression*, 148 ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW (Anver M. Emon, Mark Ellis, and Benjamin Ellis, eds. 2016). See, further, AL-MUBARAK, *supra* note 48; Ruxton, *supra* note 48.

⁵⁰ An-Na'im, *supra* note 49, at 16; Rudolph Peters & Gert J. J. De Vries, *Apostasy in Islam*, 17 DIE WELT DES ISLAMIS 1 (1976).

⁵¹ This included West Africa, North Africa (save for Northern and Eastern Egypt), and significant parts of Central and Eastern Africa.

⁵² Peters & De Vries, *supra* note 50. For Nigeria in particular, see AFRICAN PENAL SYSTEMS (Alan Milner ed., 1969).

⁵³ FITZ HERBERT RUXTON, MALIKI LAW: BEING A SUMMARY FROM FRENCH TRANSLATIONS OF THE MUKHTASAR OF SIDI KHALIL: WITH NOTES AND BIBLIOGRAPHY (1916). Ruxton's text purported to be a codification of Islamic law of the Maliki school of jurisprudence.

⁵⁴ For a classic administrative formulation of the public order rule, see LUGARD, THE DUAL MANDATE IN BRITISH TROPICAL AFRICA (1922). Specifically, administrators cited the possibility of a revolt, arguing that such a rebellion would also compel the state to deploy force in support of Europeans.

⁵⁵ For a critique of the colonial state's deployment of public order, see Rabiat Akande, *Navigating Entanglements* (May 2019) (unpublished S.J.D. dissertation, Harvard Law School).

⁵⁶ As coined by missionary historian Jan Boer. Boer's reference was to the "Great Commission," according to which Christ enjoined Christians to evangelize. See BOER, *supra* note 21; Barnes, *supra* note 21.

⁵⁷ Walter Richard Samuel Miller to Frederick Bayllis, Sept. 5, 1902, CMS/G3/A9/01, Church of England Records Centre, London.

did not seek a principled separation of the state from religion. Although they campaigned for the state to dissociate itself from caliphal institutions as a way to facilitate proselytization and conversion, this was not a call for separation. What missions sought, instead, was for the state to ally itself with missions—as it had done at the inception of imperial rule—or, in the alternative, for the state to govern the territory through so-called moderate Muslims who would be more amenable to proselytization efforts, and perhaps, open to conversion.⁵⁸ Far from acceding to imperial secularism or even calling for the principled separation of the state from all religions, missions championed a notion of religious liberty that would protect the evangelical enterprise.

To be sure, religious liberty was not absent from the legal framework of the colonial state. The Queen's 1858 declaration in the aftermath of the Indian mutiny had proclaimed religious liberty for colonial populations. In addition, the legal instrument that had ushered in formal colonialism on the African continent in general, the Berlin General Act of 1885, mandated European powers to protect "freedom of conscience" and guarantee "religious toleration" to all "natives, subjects and foreigners" in their respective colonial territories.⁵⁹ To the extent, however, that colonial administrators construed these legal pronouncements as primarily intended for the benefit of indigenous populations, they served only to bolster the empire's insistence on separation from missions. Consequently, the ecumenical notion of religious liberty stood at odds with that espoused by the state. For the state, religious liberty required that Muslims be shielded from missionary proselytization in pursuit of the goal of preserving native institutions—which were indispensable tools for the colonial project. Since proselytization hindered that goal, it had to be curtailed. To missionaries, however, proselytization was the right of both the proselytizer and the target audience; religious liberty protected not only the right of the proselytizer to proselytize, it also conferred on the target of the proselytization the right to receive the message.⁶⁰

As the inaugural gathering of world ecumenists invested in the missionary enterprise, Edinburgh 1910, therefore, provided a golden opportunity to begin the task of envisioning a religion-state design that would withstand the challenge of imperial secularism and its alliance with Islam. It was, however, the ecumenical efforts of the interwar to early postwar period that was the climax of this effort to develop a Protestant notion of religious freedom.⁶¹ In those years, the ecumenical movement both finalized its blueprint for religious freedom and championed international legal and constitution-making processes to actualize its vision.⁶²

⁵⁸ Walter Richard Samuel Miller to Frederick Lugard, July 29, 1903, CMS G3/A9/01, Church Missionary Society Archive, Cadbury Research Library, University of Birmingham. See Akande, *supra* note 55.

⁵⁹ Berlin General Act 1885, Article 6. The Act was signed at the Berlin Conference, a gathering where European colonial powers carved out their respective African territories and set out the broad contours of the legal design of their relationship as colonial powers in Africa.

⁶⁰ Report of Sub-committee of Group III of the Church Missionary Society on Difficulties with Nigerian Government, January 26, 1916, CMS/B/OMS/A3/CL/1916, Church Missionary Society, Cadbury Research Library. On the conflict posed by proselytization to international human rights see An-Na'im, *supra* note 49, at 5. See also Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARVARD INTERNATIONAL LAW JOURNAL 249 (2008); Makau wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, 5 BUFFALO HUMAN RIGHTS LAW REVIEW 75 (1999).

⁶¹ This account of the ecumenical development of a Christian notion of religious liberty therefore centers on the work of Protestants. For an account of the ultimate Catholic embrace of ecumenism and "religious liberty," see Udi Greenberg, *Catholics, Protestants and the Tortured Path to Religious Liberty*, 79 JOURNAL OF THE HISTORY OF IDEAS 461 (2018).

⁶² For a general account of the international Protestant ecumenical movement's work on the emergence of human rights, see JOHN NURSER, *FOR ALL PEOPLES AND ALL NATIONS: THE ECUMENICAL CHURCH AND HUMAN RIGHTS* (2005).

Contesting Secularism and Islamic Orthodoxy: The Global Ecumenical Movement and the Making of Article 18 of the Universal Declaration

Edinburgh marked the inception of the ecumenical critique of unchristian separation—an imperial policy and colonial sensibility that had its roots in the intellectual idea of secularism. Nevertheless, the description of the abhorred state design as secular was more typically associated with colonial administrators in the Edinburgh years. Only sparingly did Edinburgh ecumenists deploy the term *secular*; the ecclesiastical brethren devoted much of their energies to describing the crux of the constitutional problem—unchristian separations—rather than naming it.⁶³ It was in the interwar years, those between the end of the first and second World Wars, that the ecumenical movement put a name to the old problem: *secularism*.⁶⁴

As first described by the 1928 gathering of the International Missionary Council Conference in Jerusalem, secularism was not the absence of religion, it was a comprehensive belief, a “system of life and thought.”⁶⁵ Secularism amounted to paganism, and both, ecumenists argued, were in “defiance of God’s sovereignty.”⁶⁶ By asserting “human self-sufficiency,” secularism culminated in moral, political, and economic systems based on the “deification” of the “world” as well as the “self.”⁶⁷ Unchristian separations were, consequently, not the cause of secularism; they were a symptom. Ecumenists further argued that secularism was a malady afflicting the entire world and threatening Christianity everywhere.⁶⁸ The challenge to the missionary enterprise abroad by supposedly Christian empires was already a reflection of this threat. The problem was, therefore, not merely the violent repression of the church by Soviet communism and German national socialism; even in those Western European states that did not feature this intense hostility, ecumenists were concerned with the increased disempowerment of churches and the decreased salience of Christianity in the lives of European populations.⁶⁹ In “The Christianizing and Unchristianizing of the World,” a 1929 lecture to the Dutch Missionary Conference, Oldham declared that “the demonic attempt to put the world or the self in the place of God ... has stricken at the heart of Europe.”⁷⁰ It was the marginalization of Christianity, ecumenists were convinced, that

⁶³ It was in the context of criticizing the colonial policy excluding Christian instruction in schools that the Edinburgh report features a mention of the term *secular*. See REPORT OF THE WORLD MISSIONARY CONFERENCE COMMISSION I, *supra* note 15, at 29.

⁶⁴ Scholars have explored the interwar roots of this ecumenical hostility to secularism. See Justin Reynolds, *Against the World: International Protestantism and the Ecumenical Movement between Secularization and Politics, 1900–1952* (2016) (unpublished Ph.D. dissertation, Columbia University). See also Udi Greenberg, *Protestants, Decolonization, and European Integration, 1885–1961*, 89 JOURNAL OF MODERN HISTORY 314 (2017). Greenberg, for instance, argues that following World War I, ecumenical Protestants understood the spirit of nationalism that inspired the war and the rise of ideologies like Bolshevism to be rooted in “secularism.” Greenberg, *supra*, 328. Further, ecumenists understood secularism to be a false ideology replacing Christianity as “Europe’s spiritual center,” leading to a “horrendous spiritual decline.” Greenberg, *supra*, 328, 329. Although Greenberg’s account situates late interwar ecumenical opposition to colonialism within the broader ecumenical critique of secularism, it fails to uncover the earlier roots of this critique of imperial secularism in the experience of missionary restrictions in colonies, especially in Muslim Africa.

⁶⁵ Reynolds, *supra* note 64, at 114–17, 158.

⁶⁶ *Id.* at 161.

⁶⁷ *Id.* at 161, 173, 176. See Emil Brunner, *Secularism as a Problem for the Church*, 19 INTERNATIONAL REVIEW OF MISSIONS 498 (1930).

⁶⁸ See Brunner, *supra* note 67. Note of a Meeting of the British ... Members, March 18, 1927, 2 (WCC Archives [Geneva], 260.001, folder 01), cited in Reynolds, *supra* note 64, at 135.

⁶⁹ Terrence Renaud, *Human Rights as Radical Anthropology: Protestant Theology and Ecumenism in the Transwar Era*, 60 HISTORY JOURNAL 493 (2017); KEITH ROBBINS, ENGLAND, IRELAND, SCOTLAND, WALES: THE ENGLAND CHURCH 1900–2000 (2008).

⁷⁰ JOSEPH OLDHAM, THE CHRISTIANIZING AND UNCHRISTIANIZING OF THE WORLD (1929) (Joseph Oldham Papers, folder 2, box 15, New College Archive, Edinburgh University), cited in Greenberg, *supra* note 64, at 329.

produced the imperial policy that alienated Christian missions abroad. Capturing this ecumenical alarm at the dechristianization of the world, William Temple, rector at St. Paul's Piccadilly and future archbishop of Canterbury declared: "the world has gone pagan."⁷¹ The question on the mind of ecumenists then was: "what is a Christian to do?"⁷²

By the late interwar period, the ecumenical movement went beyond this initial concern; it began to regard the struggle with secularism as a threat to the "very existence of the church."⁷³ Articulating this crisis in Faeno, Denmark, in August 1934, the Universal Christian Council's Life and Work Movement set out the broad outlines of a conference to deliberate on the church-state question and respond to the challenges posed by the new paganism.

Reflecting this recognition of secularism's connections with false religion, the theme of the 1937 Oxford Conference of the Life and Work Movement was "the life-and-death struggle between Christian faith and the secular and pagan tendencies of our time."⁷⁴ The Oxford Conference regarded as the most significant event in twentieth-century ecumenism, called on the church to dismantle constraints on Christianity in Europe and abroad with the idea of "freedom of religion." In the "Report of the Section on the Universal Church and the World of Nations," the Oxford Conference affirmed the centrality of "freedom of religion" in a "better international order." According to the report, church advocacy was in pursuit of "freedom of conscience" of both Christians and non-Christians. The report asserted: "we do not ask for any privilege to be granted to Christians that is denied to others. While the liberty with which Christ has set us free can neither be given nor destroyed by any government, Christians, because of that inner freedom are both jealous for its outward expression and solicitous that all men should have freedom in religious life." The conference was careful to condemn socioeconomic privileges granted to European Christians in some imperial territories; it affirmed: "[W]e deprecate any attempt by Christians to secure under the shelter of the power or prestige of their nations any privileges in other countries in such matters as civil status, the holding of property, or language of education."⁷⁵ Yet, this caution was not a call for the disestablishment of the church, a point that the conference made clear in the "Report of the Section on Church and State."

Issued by the conference section chaired by Max Huber, the renowned Swiss churchman and judge of the Permanent Court of International Justice, the "Report of the Section on Church and State," is particularly significant for the insight it provides into the ecumenical movement's thought on church-state relations. As a structural matter, the Oxford Conference of 1937, like the Edinburgh Conference of 1910 insisted that the biblical analogy of Caesar-God separation did not support the church-state separation evinced by secularist tendencies. As the report put it, "it is God who declares what is Caesar's."⁷⁶ This inclination toward establishment was, however, conditional. The report suggested that the ultimate relationship between church and state ought to be determined by the nature of the state. Where the state fails to live up to its God-given duty of "upholding law and order," "ministering to the life of the people united within it"⁷⁷ and becomes an "instrument of

⁷¹ William Temple, *Christianity and War*, 1 PAPERS FOR WAR-TIME 3 (1914).

⁷² *Id.*

⁷³ See Renaud, *supra* note 69.

⁷⁴ Joseph H. Oldham, *Introduction to THE OXFORD CONFERENCE (OFFICIAL REPORT)*, *supra* note 17, at 2. For an account of the 1937 Oxford Conference, especially from perspective of U.S. ecumenists and their project of Christian internationalism, see MICHAEL G. THOMPSON, *FOR GOD AND GLOBE: CHRISTIAN INTERNATIONALISM IN THE UNITED STATES BETWEEN THE GREAT WAR AND THE COLD WAR* (2015).

⁷⁵ *Report of the Section on the Universal Church and the World of Nations*, in *THE OXFORD CONFERENCE (OFFICIAL REPORT)*, *supra* note 17, at 168–69.

⁷⁶ *Report of the Section on Church and State*, *supra* note 25, at 70.

⁷⁷ *Id.* at 66.

evil,”⁷⁸ the church ought to take on a position of “criticism or opposition” since the church is “not the lord” but rather a mere “servant of justice.”⁷⁹ Not only was ecumenical approval of establishment contingent on the nature of the state, it also hinged on a particular religion: the Christian church.⁸⁰

The 1937 Oxford Conference ecumenists were gravely concerned with the effect of secularization on state and society. Secularization, Oxford Conference delegates concluded, had “robbed” the state of its “religious glamor,” leading to absolutist tendencies and hostility toward the church by the state. As noted in the “Additional Report of the Section on Church and State,” this hostility manifested not only in the visible repression of the church resembling “pre-Constantine conditions”⁸¹ but also in the less obvious phenomenon of favoring the church not as an intrinsic good but for the benefits it could offer the state.⁸² Within “society,” conference delegates pointed out, secularization had given rise to materialism.⁸³ Although secularism had dechristianized state and society, the conference delegates were careful to emphasize that its claim to be devoid of religion was increasingly tenuous. To fill the spiritual vacuum left by Christianity, both the secularized state and secularized humanity had, in fact, turned to “new forms of faith,” made “new idols” and rediscovered “old religion.”⁸⁴ This old religion, according to the conference, was the quintessential sin of human glorification. Therefore, ecumenists did not imagine that secularism of the state and secularization of society had eradicated religion; rather, they were convinced that false gods and secularism could, in fact, coexist. American-English poet T. S. Eliot’s 1940 work, *The Idea of a Christian Society*, encapsulates ecumenists’ equation of secular constitutional arrangements with false orthodoxy.⁸⁵ In the book, which emerged from Eliot’s lectures during and after the 1937 Oxford Conference, the ecumenist who jointly founded a “conservative think-tank” with Oldham equated a “neutral society” with a “pagan society.”⁸⁶ In the context of this broader ecumenical understanding of secularism as a comprehensive, albeit false belief, the Islamist and secular features of places like Colonial Northern Nigeria were not only compatible but in fact, complementary.

To counter this slide into paganism, Eliot and his ecumenical brethren at the Oxford Conference called for the making of a Christian society. Although Oxford ecumenists were enthralled by the benefits of establishment to the Christian church, the conference, nevertheless, recognized that establishment did not always correlate with the freedom of the church.⁸⁷ Ecumenists, therefore, cautioned that where establishment would deprive the church of certain freedoms, the church has a duty to free itself and retrieve the freedoms “even at the cost of disestablishment.” These freedoms of the church, which were crucial both in establishment and non-establishment regimes, included the freedom to determine its faith and creed; freedom of public and private worship, preaching and teaching, freedom from any imposition by the state, of religious ceremonies and forms of worship; and freedom

⁷⁸ *Id.* at 67.

⁷⁹ *Id.*

⁸⁰ *Id.* at 66.

⁸¹ *Additional Report of the Section on Church and State*, *supra* note 17, at 233.

⁸² *Id.* at 231.

⁸³ *Id.* at 227.

⁸⁴ *Id.*

⁸⁵ T. S. ELIOT, *THE IDEA OF A CHRISTIAN SOCIETY* (1940). For more on Eliot’s thinking and his place in the ecumenical critique of secularism, see Greenberg, *supra* note 64, at 341. See also T. S. Eliot, *Catholicism and International Order*, in *ESSAYS ANCIENT AND MODERN* 113 (1936).

⁸⁶ ELIOT, *THE IDEA OF A CHRISTIAN SOCIETY*, *supra* note 85, at 5.

⁸⁷ *Id.* at 255.

of Christian service and missionary activity both at home and in foreign lands.⁸⁸ Not surprisingly, then, the 1937 Oxford Conference was preoccupied with the question of evangelization. As the “Additional Report of the Section on Church and State” stressed in its concluding lines: “The one thing that matters is that it [the church] should be free to proclaim the good news of Christ, without let or hindrance, in accordance with the commission given to the church by its Lord.”⁸⁹ When the International Missionary Conference reconvened the following year in Tambaram, India, it put the issue of proselytization at the center of its agenda, listing this among the “most essential” rights.⁹⁰

The Oxford Conference’s most far-reaching decision was its establishment of the World Council of Churches with the specific goal of working toward the making of an international legal provision on religious liberty. In turn, the World Council of Churches established the Commission of the Churches on International Affairs to achieve this goal. Specifically, the conception of rights to be advanced by the World Council of Churches was rooted in the idea of “Christian personalism”: that “the human being [is] a theological person in community with others and in partnership with God.”⁹¹ Although universal, the personalist notion of humanity was therefore rooted in Christian theology and the firm missionary conviction that all men were potential Christians.⁹² Although the Oxford Conference of 1937 had resolved that it was incumbent on the church to defend universal humanity regardless of nationality, race, or class, this universal mandate was to be molded by Christian personalism and the primacy of religious freedom as the foundation for all rights. As the World Council of Churches declared several years later at a 1949 Chichester meeting: “a peaceful and stable order can only be built upon foundations of righteousness, of right relations between man and God and between man and man. Only the recognition that man has ends and loyalties beyond the State will ensure true justice to the human person. Religious freedom is the condition and guardian of all true freedom.”⁹³

This notion that religious freedom was the foundation of human rights had been advanced by the famous report *Six Pillars of Peace*, issued in 1943 by the U.S.-based Federal Council of Churches’ Commission to Study the Bases of a Just and Durable Peace, chaired by John Foster Dulles. Dulles had himself been a platform speaker on international affairs at the Oxford Conference and was actively involved in the “Report of the Section on the Universal Church and the World of Nations.” *Six Pillars of Peace* not only called for an international bill

⁸⁸ *Report of the Section on Church and State*, *supra* note 25, at 72–73 (quotation at 73). Other freedoms of the church included freedom to cooperate with other churches, freedom to determine the nature of its government and the qualification of its ministers and members, and conversely, the freedom of the individual to which he feels called; freedom to control the education of its ministers, to give instructions to its youth and to provide for adequate development of their religious life; and freedom to use such services open to other citizens and associations as will make possible the accomplishment of these ends as, for example, the ownership of property and the collection of funds.

⁸⁹ *Additional Report of the Section on Church and State*, *supra* note 17, at 255 (citing Matthew 28:18–20).

⁹⁰ Other rights set out in the India 1938 report were similar to those in the report from the 1937 Oxford Conference. See *Discrimination in Religious Rights and Practices: Pertinent Statements by the Commission of the Churches on International Affairs and Related Ecumenical Agencies from 1937–1955*, p. 3, BCC/DIA/7/3/4/3, Church of England Records Centre.

⁹¹ Samuel Moyn, *Personalism, Community, and the Origins of Human Rights*, in *HUMAN RIGHTS IN THE TWENTIETH CENTURY* 85 (Stefan-Ludwig Hoffmann ed., 2011) (citing Jacques Maritain and Charles Malik as influential in this project). See also MOYN, *supra* note 18; Samuel Moyn, *The First Historian of Human Rights*, 116 *AMERICAN HISTORICAL REVIEW* 58 (2011). For an account of the theological foundations of the idea of personalism, see Renaud, *supra* note 69; Reynolds, *supra* note 64.

⁹² Renaud, *supra* note 69, at 497. See also NURSER, *supra* note 62, at 83, Reynolds, *supra* note 64, at 29.

⁹³ Renaud, *supra* note 69, at 515; GEORGE K. BELL, *THE KINGSHIP OF CHRIST: THE STORY OF THE WORLD COUNCIL OF CHURCHES* 85, 124–28 (1954). See also VISSER’T HOOFT, *MEMOIRS [OF] W. A. VISSER’T HOFT* 219 (1973).

of rights, but it also advocated for religious liberty as its “essential linchpin.”⁹⁴ The Federal Council of Churches and the American Protestants it represented were immersed in this project of internationalizing a personalist notion of rights and considered religious freedom to be its foundation.⁹⁵ Indeed, this missionary campaign for the centrality of religious freedom to postwar international order had begun to gain political traction even before the Federal Council of Churches’ *Six Pillars of Peace*. For instance, in his famous address to Congress in January 1941, U.S. president Franklin Roosevelt outlined religious liberty as part of the four basic freedoms.⁹⁶ Subsequently, when the Atlantic Charter concluded by Roosevelt and Winston Churchill later that year failed to explicitly reference the freedom of worship, Roosevelt came under such intense criticism from the Protestant coalition that he was prompted to submit to Congress: “it is unnecessary for me to point out that the declaration of principles includes of necessity the world need for freedom of religion and freedom of information. No society of the world organized under the announced principles could survive without these freedoms which are a part of the whole freedom for which we strive.”⁹⁷

It was therefore unsurprising that U.S. Protestants came to be at the forefront of harnessing international ecumenical thought on religious freedom into a concrete international legal provision. The Commission of the Churches on International Affairs’ inaugural director and architect of Article 18 was Otto Frederick Nolde, Dean of the Graduate School at the Lutheran Theological Seminary in Philadelphia. Prior to his time at the Commission of the Churches on International Affairs, Nolde had served as spokesman of the Joint Committee on Religious Liberty jointly established by the Federal Council of Churches and the Foreign Missions Conference in North America in 1942. Like the Commission of the Churches on International Affairs, the Joint Committee on Religious Liberty had as its aim the crafting of an international legal provision on religious freedom.⁹⁸ Further, like the Commission of the Churches on International Affairs, the Joint Committee on Religious Liberty made the freedom to proselytize and convert a crucial element in this envisaged international legal provision.⁹⁹

⁹⁴ SAMUEL MOYN, *CHRISTIAN HUMAN RIGHTS* 149 (2015). For the text of the six pillars, see “A JUST AND DURABLE PEACE”: STATEMENT OF POLITICAL PROPOSITIONS (Federal Council of the Churches of Christ in America, 1943). For further commentary, see ANNA SU, *EXPORTING FREEDOM: RELIGIOUS LIBERTY AND AMERICAN POWER* (2016); FREDERICK O. NOLDE, *FREE AND EQUAL: HUMAN RIGHTS IN ECUMENICAL PERSPECTIVE WITH REFLECTIONS ON THE ORIGIN OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (Frederick O. Nolde ed., 1968).

⁹⁵ For an account of how American Protestantism took on the mantle of internationalized human rights, see Gene Zubovich, *The Global Gospel: Protestant Internationalism and American Liberalism, 1940–1960* (2014) (unpublished Ph.D. dissertation, University of California, Berkeley).

⁹⁶ Others were freedom of speech and expression, freedom from want, and freedom from fear. Franklin D. Roosevelt, Annual Message to the Congress (January 6, 1941), S. Doc. No. 77-188, at 86–87 (2d Sess. August 12, 1942).

⁹⁷ Quoted in Quincy Wright, *Human Rights and the World Order*, 21 *INTERNATIONAL CONCILIATION* 264 (1942–1943). On the U.N. Charter, see RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945*, at 975 (appendix B) (1958) (reproducing H. Doc. 358/77C1/1941). See also EVANS, *supra* note 18, at 174.

⁹⁸ Nolde also served as an associate in the Federal Council of Churches’ advisory group to the U.S. delegation to the U.N. charter talks. The task of the group was the promotion of human rights in the charter negotiations.

⁹⁹ The Joint Committee on Religious Liberty’s statement on religious liberty provides: “Religious liberty shall be interpreted to include freedom of worship according to conscience and to bring up children in the faith of their parents; freedom for the individual to change his religion; freedom to preach, educate, publish, and carry on missionary activities; and freedom to organize with others and to acquire and hold property, for these purposes.” “Statement on Religious Liberty,” adopted in 1944 by the Federal Council of Churches (April 12) and the Foreign Missions Conference (March 21), quoted in Linde Lindkvist, *The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights*, 4 *HUMANITY—AN INTERNATIONAL JOURNAL OF HUMAN RIGHTS, HUMANITARIANISM, AND DEVELOPMENT* 429, 440 (2013).

A useful lens through which one might understand the Joint Committee on Religious Liberty's postwar vision of religious liberty is its report, *Religious Liberty: An Inquiry*, published in 1945 and authored by Miner Searle Bates, Baptist missionary and professor of history at China's Nanking University.¹⁰⁰ Disregarding the horrors of the Holocaust, *Religious Liberty* found the most extreme cases of denial of religious liberty in Soviet Russia, Franco's Spain, and "Moslem Countries." Indeed, the report considered the restrictions on religious freedom by Soviet Russia as not only the action of a totalitarian state but also as evidence of the "profound incompatibility" of religious liberty and the secularism espoused by communism.¹⁰¹ While Russia, therefore, represented extreme hostility to religion, the report argued that Spain's problem lay in the monopoly of the Roman Catholic Church and the resulting infringement of the religious liberty of people of other religions.

In the case of "Orthodox Islam," the report found it to be "the contrary of religious liberty" that "finds no room for the concept as developed in Western lands."¹⁰² The report, which spans close to six hundred pages, identified the doctrine of *ridda* as the primary culprit for this absence of religious liberty. Although Bates and the Joint Committee on Religious Liberty were concerned with India's restrictions on conversions from Hinduism to Christianity, they considered Islamic restrictions to be the most egregious violations of religious liberty. Bates stressed that Iraq, Palestine, Lebanon, and Northern Sudan were the only Near East countries with an established and recognized procedure regarding conversions from Islam and attributed the departure to influences external to Islam. Even in these cases of permitted conversions, converts were, in Bates's account, subject to disabilities on matters concerning inheritance and employment among others. Even the classical status of *ahl al-kitab* (People of the Book) guaranteeing communal protection for Christians and Jews in Muslim territories did not escape critique. Bates argued that this legal status merely permitted these religions "to continue in quiescent communities, on sufferance as long as they do not challenge the dominant Islamic society." The religious liberty agenda was targeted at addressing "the socio-religious-political pressures for uniformity in the Mohammedan societies."¹⁰³

Religious Liberty adopted a remarkably generous tone in its assessment of the allied West. Beyond its identification of paganistic secularism and the consequent subjugation of religious liberty with the East, the report was careful not to implicate Western colonial powers in its critique of Islamic orthodoxy. In analyzing the case of Northern Nigeria, for instance, the report centered its critique solely on Islam. Minimally commenting on British indirect rule's propensity to bolster precolonial religion in the territory, *Religious Liberty* praised Britain's tradition of tolerance as a potentially positive influence on orthodox Islamic practices in Northern Nigeria. In Egypt, the report blamed Islamic orthodoxy's co-optation of constitutional text and politics and in Turkey, the culprit was the meeting of the faith with nationalism and authoritarianism.¹⁰⁴ Indeed, condemnation of colonial powers' culpability in the restrictions on religious liberty was limited to Roman Catholic European

¹⁰⁰ M. SEARLE BATES, *RELIGIOUS LIBERTY: AN INQUIRY* (Da Capo Press 1972) (1945).

¹⁰¹ Bates argued that communism was in some ways akin to religion though "without the name, providing for men, a conviction of destiny, a bond of emotion and action, prophets and saints of authority if not actual saviors, an ethic systematically inculcated, a message and program of salvation for the multitude." *Id.* at 2.

¹⁰² *Id.* at 9.

¹⁰³ *Id.* at 305.

¹⁰⁴ However, the report found that Atatürk's laicist Turkey was "tending towards" religious liberty, in a remarkable pattern of progress from the pre-revolution period. *Id.* at 13–14.

Powers particularly in Mussolini's Africa.¹⁰⁵ The report was therefore emphatic in locating the problem of religious liberty outside of the West.¹⁰⁶

It is important to acknowledge the points of contact between *Religious Liberty* and general ecumenical thought. Like the Oxford report and the thought espoused at Edinburgh 1910, *Religious Liberty* was not averse to the establishment of Christianity and did not regard it as a threat to religious freedom. Indeed, *Religious Liberty* was effusive in its praise for the British tradition of establishment of the Church of England, arguing that it featured a "high degree of religious liberty" and "a tradition of social tolerance."¹⁰⁷ Although the report acknowledged that the British constitutional arrangement tied key political appointments to members of the Church of England and granted Parliament authority over forms of worship,¹⁰⁸ it regarded these features as insignificant.¹⁰⁹

Religious Liberty's sanction of the intermingling of church and state was also apparent in its analysis of U.S. constitutional practice. Besides England, the United States was the other beacon of religious liberty highlighted in Bates's report. Importantly, the report did not consider U.S. religious liberty to be the necessary product of church-state separation. As Bates pointed out, the First Amendment to the U.S. Constitution was not intended to prescribe church-state separation but was rather designed to prevent the federal government's interference with the church-state entanglements that existed during the making of the First Amendment. U.S. national policy on religion, according to Bates, was "separation of state from Church, but not from Christianity."¹¹⁰ Citing Christian prayers at government events, Sunday's work-free status, holidays with Christian roots, and blasphemy laws based on Christian ideas, Bates pointed out that these features of the U.S. religion-state arrangement amounted to "informal support of Christianity"¹¹¹ and protected the "Christian standards of the majority."¹¹² Nevertheless, Bates stressed that these manifestations of the entanglement of the church with state did not amount to restrictions on religious liberty pointing to the "popular American view that entire religious liberty had been secured" and the approval, "even ... envy," of European scholars for American religious liberty.¹¹³

Although Bates conceded that church-state separation might sometimes correlate to a higher degree of religious liberty than church-state union, he insisted that the evidence was not conclusive. Church-state separation, Bates argued, may be a mere manifestation of secularization, rather than the "triumph of free religion" that is the true goal of religious liberty.¹¹⁴ Secularization was, in Bates' formulation, the separation of religion from

¹⁰⁵ Bates points out that although Mussolini had declared support for Muslim liberty in Tripoli, this was a markedly different stance from that which he had assumed in Christian Ethiopia. *Id.* at 42–49. For the argument that anti-Catholic attitudes of U.S. Protestants influenced the Joint Committee on Religious Liberty's thought and advocacy, see NURSER, *supra* note 62, at 82–83.

¹⁰⁶ This was in contradiction not only to Muslim societies but also to Eastern Europe. Indeed, certain ecumenists regarded Eastern Europe as the front of the religious liberty problem. For example, Martin Wight, British ecumenist, Anglican layman, and editor of the World Council of Churches' periodical, the *Ecumenical Review*, argued that it was in the West's struggle against the Soviet Union "that the demonic concentrations of power of the modern neo-pagan world have their clearest expression." Martin Wight, *The Church, Russia, and the West*, 1 *ECUMENICAL REVIEW* 25 (1948), quoted in Reynolds, *supra* note 64, at 292.

¹⁰⁷ BATES, *supra* note 100, at 117.

¹⁰⁸ *Id.* at 85–86. For instance, the amendment to the Church of England's *Book of Common Prayer* in 1934 required the endorsement of the Parliament. *Id.* at 86 (citing CECILIA M. ADY, *THE ENGLISH CHURCH AND HOW IT WORKS* (1940)).

¹⁰⁹ The report labeled such issues "minor." *Id.* at 85.

¹¹⁰ *Id.* at 90.

¹¹¹ *Id.* at 95.

¹¹² *Id.* at 90.

¹¹³ *Id.* at 89.

¹¹⁴ *Id.* at 374.

community life and not compatible with religious freedom. Rather, *Religious Liberty* advocated for “friendly separations,” which Bates described as church-state arrangements permitting “little or much voluntary cooperation between Church and State as the citizens may desire and agree upon.”¹¹⁵

These “friendly separations,” which Bates found to be based on a fundamentally Christian idea, charted the middle course between the extremes of “state-implemented religion” and “individualistic religion”¹¹⁶ and would permit the triumph of the free religion advocated by the report. Marking the uniqueness of Protestant thought on religious liberty, Bates argued that the mainline Protestant position is the most favorable to religious liberty, taking great care to compare it to the Islamic position (which he dismissed) and the Roman Catholic approach (which he argued, is marked by the exaltation of the liberty of the church rather than that of the individual).¹¹⁷ Hence, *Religious Liberty*’s approval for establishment was not absolute, as it condemned both the Muslim and Spanish arrangements. Neither did *Religious Liberty* imagine that the secularization of state and society held the answer since secularization was named as a key culprit in the infringement of religious liberty.

Ultimately, the report emulated that of the 1937 Oxford Conference by recommending the adoption of an “International Bill of Rights” or “International Charter of Liberties”¹¹⁸ to tackle constraints on religious liberty. As with Oxford, prominent among the provisions in this bill were to be rights to worship, convert, preach, and teach. Nevertheless, the Joint Committee on Religious Liberty’s report indulgently chided the “unrealistic efforts” in ecumenical circles to center the advocacy for these rights on the movement’s Christian personalist notions. Consequently, while the report advanced the proposals of ecumenical groups,¹¹⁹ it, at the same time, put forth the proposal designed by the American Law Institute’s Committee of Advisors on Human Rights. The committee, which drew representatives from the United States, Britain, Canada, China, France, Germany, Italy, Poland, Soviet Russia, Syria, and countries in South America, had been commissioned by the Council of the American Law Institute. Unlike the ecumenical proposals cited in *Religious Liberty* and forming the crux of its rights charter plan, the proposal of the American Law Institute’s committee did not provide for the right to convert or proselytize.¹²⁰ Although both the Joint Committee on Religious Liberty and the Federal Council of Churches, along with their global ecumenical colleagues, continued to insist on these core rights, the inclusion of the committee’s proposal was reflective of the outlook of the American ecumenists. The American Protestant elites, particularly Dulles and Nolde, were in fact, criticized by global ecumenical counterparts, including the Swiss jurist Max Huber, as attempting to “translate” the Protestant project of “personhood” into “a legal idiom with broad appeal to people of goodwill whether or not Christian.”¹²¹

Like other elites of the Joint Committee on Religious Liberty, Nolde regarded *Religious Liberty* as a key achievement. Reviewing the report in the *Annals of the American Academy of Political Science*, Nolde stressed that its significance lay in its contribution to the “urgent”

¹¹⁵ *Id.* at 374.

¹¹⁶ *Id.* at 375.

¹¹⁷ *Id.* at 376.

¹¹⁸ *Id.* at 573.

¹¹⁹ *Id.* at 309, 575–76. These statements were issued by the Joint Committee on Religious Liberty (1944); British Commission of the Churches for International Friendship and Social Responsibility (1939); and in an unpublished paper by an “informal group” of American Protestants and Roman Catholics.

¹²⁰ *Id.* at 575. See also, *The Statement of Essential Human Rights*, THE AMERICAN LAW INSTITUTE (Dec. 10, 2018), <https://www.ali.org/news/articles/statement-essential-human-rights/> (last visited Aug. 8, 2020).

¹²¹ Reynolds, *supra* note 64, at 414. I offer a detailed discussion of this critique below, in the section headed “A Nation ‘Divided by God.’”

global imperative of securing human rights.¹²² The spokesman for the Joint Committee on Religious Liberty then commended the report to those striving to actualize that goal. Three years later, Nolde became the inaugural director of the World Council of Churches' Commission of the Churches on International Affairs. In that capacity, Nolde not only had the opportunity to actualize the vision of the Joint Committee on Religious Liberty, but he was also integral to the formulation of the international charter that *Religious Liberty* proposed.¹²³ Acknowledging Nolde's work in the crafting of the Universal Declaration of Human Rights, former first lady Eleanor Roosevelt, chair of the U.N. Commission on Human Rights, pointed out that Nolde was the most active nongovernmental organization delegate to the negotiations and drafting proceedings of the instrument.¹²⁴ The ecumenical movement's participation was not limited to the nongovernmental organization delegation. Charles Malik, prominent Lebanese member of the Commission of the Churches on International Affairs, was rapporteur of the U.N. Commission on Human Rights and Dulles was actively involved in the San Francisco drafting and negotiation proceedings that produced Article 18.¹²⁵ Nevertheless, Nolde is credited with actualizing the ecumenical movement's goal. In Malik's words, Article 18, the Universal Declaration's provision on religious liberty was "principally his [Nolde's] fashioning."¹²⁶ For the ecumenical brethren, Article 18 was the core of the rights provisions in the Universal Declaration since they had always held fast to the view that religious liberty was the foundation of all rights.¹²⁷ As Malik admitted: "though I cared for every word in the Declaration, I felt that, if we should lose on this Article on freedom of conscience and religion ... my interest in the remainder of the Declaration would considerably flag... [W]ithout the full and unimpaired right to think and believe freely, the value of these other rights pales into relative insignificance."¹²⁸

In its final form, Article 18 captured the thrust of ecumenical concerns: "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 teaching, practice, worship and observance."¹²⁹

¹²² Frederick O. Nolde, Book Review, 53 *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 150 (1946) (reviewing M. SEARLE BATES, *RELIGIOUS LIBERTY: AN INQUIRY* (1945)).

¹²³ On the global Protestant ecumenical origins of Article 18 of the Universal Declaration of Human Rights and on the work of the Commission of the Churches on International Affairs and Nolde in particular, see LINDE LINDKVIST, *SHRINES AND SOULS: THE REINVENTION OF RELIGIOUS LIBERTY AND THE GENESIS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2014); Pamela Slotte, *Whose Justice? What Political Theology? On Christian and Theological Approaches to Human Rights in the Twentieth and Twenty-first Centuries*, in *INTERNATIONAL LAW AND RELIGION: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 210 (Martti Koskeniemi et al., 2017) (arguing that "human rights work" was "a Christian task"); MATTI PEIPONEN, *ECUMENICAL ACTION IN WORLD POLITICS: THE CREATION OF THE COMMISSION OF THE CHURCHES ON INTERNATIONAL AFFAIRS, 1945–1949* (2012); MOYN, *supra* note 94. For an account of how the Commission of the Churches on International Affairs came to be granted a formal consultative status within the United Nations Human Rights Council, see PEIPONEN, *supra*, at 232.

¹²⁴ See Eleanor Roosevelt, *Introduction to FREEDOM'S CHARTER: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (Frederick O. Nolde ed., 1949).

¹²⁵ For diverse perspectives on Malik's human rights work, see Lindkvist, *supra* note 99, at 436–38; JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* (1999); GLENN MITOMA, CHARLES H. MALIK AND HUMAN RIGHTS: NOTES ON A BIOGRAPHY 222–41 (2010); GLENDON, *supra* note 18, at 222–32; MAKU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* 154–55 (2002).

¹²⁶ Charles Malik, *The Universal Declaration of Human Rights*, in *FREE AND EQUAL: HUMAN RIGHTS IN ECUMENICAL PERSPECTIVE* 10–11 (Frederick O. Nolde ed., 1968).

¹²⁷ See Renaud, *supra* note 69.

¹²⁸ Malik, *supra* note 126, at 11.

¹²⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 18 (Dec. 10, 1948). Scholars like Malcom Evans point out that the broader postwar turn to human rights was due to the failure of the minority rights regime of the interwar period. See EVANS, *supra* note 18; Mark M. Mazower, *The Strange Triumph of Human Rights, 1933–1950*, 47 *HISTORY JOURNAL* 379 (2004). Nevertheless, there is no doubt that ecumenical experience, discourse, and advocacy were crucial

Article 18's protection of conversion, and implicitly, the right to proselytize, were crafted to address the challenges Islamic orthodoxy posed to missionary activity in places such as Muslim Africa. By affirming the right of the proselytizer to evangelize as well as the right of the target to accept the message, Article 18 aimed to override the Islamic doctrine of *ridda* and dismantle legal and administrative constraints on missionaries seeking to spread the gospel.

Of the infamous trio identified at the 1910 Edinburgh Conference—Sudan, Northern Nigeria, and Egypt—only Egypt was present at the Article 18 drafting proceedings since much of Muslim Africa had not attained independent statehood at the time. Together with Saudi Arabia, Egypt mounted a critique on Article 18's provisions on conversion and proselytizing.¹³⁰ The states challenged Article 18 as the product of an empire-missionary alliance intended to further the European missionizing project and cited instances in which missionary activity had stirred unrest and religious conflict which had paved the way for imperial expansion.¹³¹ Jamil Baroody, Saudi Arabia's representative, pointed out that "throughout history, missionaries had often abused their rights by becoming the fore-runners of political intervention, and there were many instances where peoples had been drawn into murderous conflict by the missionaries' efforts to convert them."¹³² Yet, Muslim opinion was by no means unanimous. Unlike Saudi Arabia and Egypt, Pakistan supported the freedom of conversion provision, arguing that freedom of religion is intrinsic to Islamic law. *Ridda*, Pakistan argued, was a "spiritual offence" and therefore not the subject of worldly penalties. In the words of Zafrullah Khan, the Pakistani delegate, "however condemnable [apostasy] is a spiritual offense and entails no temporal penalty. This is the essence of the freedom to change one's religion. The Quran is explicit on it."¹³³

Article 18 survived these challenges and made it into the Universal Declaration of Human Rights. The critique from some ecumenical quarters led by Max Huber that the international human rights project led by the Joint Committee on Religious Liberty had blunted some of the Christian personalist elements for the sake of broad appeal remained. Yet, the adoption of Article 18 was widely acclaimed as a triumph. The success of the religious liberty campaign was, without doubt, a highpoint of twentieth-century ecumenism. In two years, Article 18 found its way into the European Convention on Human Rights.¹³⁴ The Commission

to the crafting of Article 18, and for these influential ecumenists, religious liberty was the core of human rights. See PEIPONEN, *supra* note 123, at 226–28.

¹³⁰ Saudi Arabia voiced its objections during the debates in the Human Rights Commission while Egypt expressed its disapproval when the proposal was tabled before the United Nations General Assembly. See John Kelsay, *Saudi Arabia, Pakistan and the Universal Declaration of Human Rights*, in *HUMAN RIGHTS AND THE CONFLICT OF CULTURES: WESTERN AND ISLAMIC PERSPECTIVES ON RELIGIOUS LIBERTY* 33 (David Little, John Kelsay & Abdulaziz A. Sachedina eds., 1988).

¹³¹ Lindkvist, *supra* note 99; see LINDKVIST, *supra* note 123.

¹³² 3rd Session, Third Committee, 127th & 128th Meetings (1949) (A/C.3/SR.127-128), at 391–92, 396, *quoted in* EVANS, *supra* note 18, at 187.

¹³³ ZAFRULLAH KHAN, *ISLAM AND HUMAN RIGHTS* 117 (1967); Malik, *supra* note 126, at 10, 45. There were some dissenting voices in Europe. Sweden and Greece, both states with an intimate relationship with a specific religious denomination, raised significant opposition to the provisions. In what was framed as an effort to "protect individuals who have religious beliefs different from the officially recognized religion, or who have no religious belief whatever, against manifestations of religious fanaticism," the Swedish delegate proposed a proviso: "that this does not interfere unduly with the personal liberty of anybody else." Sympathizing with the Swedish proposal, the Greek representative expressed concern that the freedom to manifest religion might "lead to unfair practices of proselytizing" and ultimately, to "unfair competition in the sphere of religion." 3rd Session, Third Committee, 127th & 128th Meetings (1949) (A/C.3/SR.127-128), at 391–92, 396, *quoted in* EVANS, *supra* note 18, at 186, 137.

¹³⁴ This was, however, with the insertion of a limitation proviso: "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." European Convention on Human Rights art. 9(2).

of the Churches on International Affairs then embarked on a successful campaign to domesticate the international legal provision into national constitutions, devoting particular attention to Muslim lands.¹³⁵ Wielding Article 18, mission-minded ecumenists dismantled barriers to accessing the mission field. As they did so, they congratulated themselves on their feat: no longer would secularism, especially that expressed as unchristian separation, curb missionary proselytization while advancing false faiths.

A Nation “Divided by God”¹³⁶

Although the globalization of Article 18 did not manifest directly in U.S. law as it did elsewhere, neither did the ecumenical project depart the United States with the ecumenists following the Article 18 negotiations in San Francisco. In fact, clear, if sometimes delicate, links connect current U.S. debates and the earlier twentieth-century global ecumenical story. Most immediately, the rift within the global ecumenical movement between elites of the Joint Committee on Religious Liberty, Frederick O. Nolde and John Foster Dulles, and ecumenists like Max Huber, came to manifest as a crack within U.S. Protestantism. That intra-Protestant divide came to shape the course of U.S. struggles over religion-state relations. Manifested in the United States as a debate over the proper attitude of Protestants to the exclusion of Protestant exercises in schools, the rift was, at its core, a reenactment of the Dulles-Huber disagreement over whether the Protestant project ought to be translated in broad, general terms. In the United States, the disagreement did not lead to the triumph of the Dulles-Noldean position as occurred on the international plane. Rather, the split culminated in the exodus of Evangelicals evincing Huber’s view, and following that, the alliance of these Evangelicals with Catholics in the 1970s. These U.S. “religious antiliberals”¹³⁷ (as the Evangelical-Catholic coalition came to be known) inherited the legal arguments of their ecumenical forbears—the critique of secularism as an unchristian separation and the neutralization of the unchristian separation through a Christian preferentialist notion of religious liberty. At the same time, however, in opposing the mainline Protestant position, these religious antiliberals paradoxically branded their international ecumenical forbears who invented the arguments as opponents. U.S. constitutional discourse therefore came to feature both striking continuities and marked reversals from the earlier ecumenical debate.

Debating Translation: An Afterlife of Article 18

As I have shown above, the triumph of the American-led effort to enshrine an international notion of religious liberty was overshadowed by accusations that it had been at the cost of de-Christianizing the global ecumenical vision. Dulles, Nolde, and other elites of the Joint Committee on Religious Liberty were not the only ecumenists subject to this critique. The disagreement was laid bare when the incipient World Council of Churches convened at the Beau Séjour hotel in Geneva in 1939 to deliberate on stopping the imminent war. The discussion featured not only laypersons like Dulles and Huber, but also theologians such as Emil Brunner. Building on Brunner’s idea of “minimum morality” for all peoples, Christians and non-Christians, Dulles made a case for state protection of “the dignity and worth of

¹³⁵ Early success was recorded in Pakistan, Indonesia, Sudan, and India. Nigeria recorded one of the most protracted debates, but ultimately, the domestication campaign prevailed at the 1958 London Constitutional Conference. Akande, *supra* note 55.

¹³⁶ The heading is borrowed from Noah Feldman. See NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005).

¹³⁷ Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 5, at 1356–59.

individual persons.”¹³⁸ Although Dulles was clear that the ultimate aim of such a project was to indirectly infuse Christian ideals into public life and international affairs in furtherance of the ecumenical cause, this plan went beyond the missionary “religious liberty” campaign. Dulles’s proposal received the support of the majority of the Beau Séjour ecumenists, and the gathering agreed on the value of espousing “rights” principles as a “moral” rather than a “faith” matter. The ecumenists proclaimed in the resulting report: “While it is our Christian faith which urges us to adhere to these principles, they are of such a character that many who do not profess the Christian faith but are equally bewildered by the openly proclaimed moral anarchy, will respond with cordial assent.”¹³⁹

One scholar argues that “the political inscription of theological personhood blunted the anti-secular polemic that produced the concept of personhood in the first place.”¹⁴⁰ This was precisely the impression of Max Huber. Arriving days late into the conference, Huber was consternated by the direction of the proceedings. The duty of the church, Huber argued, was not to “win assent” from non-Christians. Its obligation is “to say to the world a specifically Christian word.”¹⁴¹ Huber pointed out that the ecumenists had instead issued a report of which “[t]wo-thirds ... could have been said as well by any well-intentioned non-Christian people” and concluded that the report was to that extent, “a secular message.”¹⁴² These criticisms hounded Dulles’s work, including his Commission on a Just and Durable Peace. Swedish ecumenist Nils Ehrenström, for instance, argued that the Dulles Commission privileged the creation of political institutions over the primary Christian goal of spreading the gospel.¹⁴³ To these Huberian ecumenists, this critique extended beyond Dulles’s work, tainting the entirety of the American Protestant-driven Article 18 effort.

The critique that Dulles’s and Nolde’s work “translated” Christian ideas into a “legal idiom with broad appeal among people of goodwill” lives on in the U.S. Evangelical and fundamentalist disagreement with liberalized Protestantism.¹⁴⁴ Starting with the *McCollum*, *Engel*, and *Abington* decisions, a rift opened within U.S. Protestantism, with Evangelicals and Fundamentalists beginning to dissent from the mainline Protestant position. These dissenters argued that in endorsing the exclusion of devotional exercises, mainline Protestants had promoted “the evacuation of religion from public discourse.” Their erstwhile brethren had joined “the fight for separation of religion from government” on the wrong side with the consequence of “giving up their claim to provide unique moral truths ... [and granting] secular liberal ideas primacy over religion.”¹⁴⁵ By doing so, Evangelicals argued, mainline Protestants had joined forces with secularism.

The Supreme Court’s *McCollum v. Board of Education*¹⁴⁶ decision, handed down on March 8, 1948, while Article 18 deliberations unfolded in San Francisco, opened this intra-Protestant divide. The Court’s invalidation of a school religious program set off a division among

¹³⁸ PROVISIONAL COMMITTEE OF THE WORLD COUNCIL OF CHURCHES, CHURCHES AND THE INTERNATIONAL CRISIS: A MEMORANDUM PREPARED BY AN INTERNATIONAL CONFERENCE OF LAY EXPERTS AND ECUMENICAL LEADERS CONVENED IN JULY, 1939, at 7 (1939), *quoted in* Reynolds, *supra* note 64, at 271.

¹³⁹ Reynolds, *supra* note 64, at 274.

¹⁴⁰ *Id.*

¹⁴¹ CHURCHES AND THE INTERNATIONAL CRISIS, *supra* note 138, at 36, *quoted in* Reynolds, *supra* note 64, at 275.

¹⁴² *Id.* at 275.

¹⁴³ FEDERAL COUNCIL OF CHURCHES, REPORT OF DELAWARE CONFERENCE ON A JUST AND DURABLE PEACE (1942), *cited in* Reynolds, *supra* note 64, at 283. *See also* John M. Mulder, *The Moral World of John Foster Dulles: A Presbyterian Layman and International Affairs*, 49 JOURNAL OF PRESBYTERIAN HISTORY 157, 171 (1971) (arguing that “religious language was largely absent” from the *Six Pillars of Peace*).

¹⁴⁴ Reynolds, *supra* note 64, at 414–15.

¹⁴⁵ FELDMAN, *supra* note 136, at 199 (citing RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984)).

¹⁴⁶ 333 U.S. 203 (1948).

U.S. Protestants most evidently within the ranks of Protestants and Other Americans United for the Separation of Church and State. The organization was founded in the wake of the 1947 *Everson* decision¹⁴⁷ to advance the separation of church and state. Nevertheless, the organization did not support separation unequivocally, as its mission suggested; it sought to protect the wall of separation from being breached by a specific religion—Catholicism. While Protestants United cheered on the famous *Everson* pronouncement of a “wall of separation between Church and State,” it was alarmed by the Court’s declaration that state funding (of transportation costs) for parochial schools—at the time overwhelmingly Catholic—was constitutional. In a scathing editorial critique of the decision, the *Christian Century*, a mainline Protestant publication, argued that the Court’s decision was another sign of the incremental “encroachments by the Roman Church” on the wall of separation.¹⁴⁸ The “ultimate purpose” of those encroachments, argued Clayton Morrison, author of the editorial and vice president of Protestants United, was the elimination of “the wall of separation.”¹⁴⁹ In another publication, Morrison argued that *Everson* was an “unAmerican development,” pointing out that although the Roman Catholic intrusion into the state was initially “obscured by a sentimental and humanitarian appeal” to the interests of children, the stealth process of encroachment would ultimately destroy the wall of separation.¹⁵⁰ Protestants United, therefore, sought to protect the wall from the threat of Catholic intrusion as laid out by founding member Paul Blanshard in his controversial 1949 book, *American Freedom and Catholic Power*.

McCullum challenged Protestants United’s apparent commitment to separation. Invoking the wall of separation and the no-aid rationale laid down in *Everson*, the Court held that school released time for religious instruction, a program popular among Protestants, was unconstitutional.¹⁵¹ Ernest Johnson, a prominent member of the Federal Council of Churches and an educator, described the irony wrought by the *McCullum* decision: “Up to now we have thought of the separation of church and state as virtually synonymous with religious liberty, a principle with which we consider ourselves closely identified historically. It has been something of a Protestant slogan. Now we find it used to challenge one of our most distinctive enterprises. We have regarded the separation of church and state almost as an aspect of Protestant strategy. There is a striking irony in the turning of the tables.”¹⁵² Drawing attention to the divide between the notion of separation espoused by *McCullum* and that advanced by Protestants, Johnson declared: “Whereas our main concern from the beginning has been to defend religion against the state, their main concern is to defend the state against religion.” Johnson declared that *McCullum* “gored” the “ox” of Protestants by espousing the latter view of separation.¹⁵³

The rift between mainline Protestants and Evangelicals following *McCullum* bore an uncanny resemblance to the Dulles-Huber divide within global ecumenical discourse. The mainline Protestant reaction to *McCullum* was unmistakably similar to the Dulles-Nolde position in international ecumenical discourse. To be sure, the support that the *McCullum* decision found among the upper echelons of the Protestants United leadership was not

¹⁴⁷ *Everson v. Board of Education*, 330 U.S. 1 (1947).

¹⁴⁸ Editorial, *Now Will Protestants Awake?*, 64 *CHRISTIAN CENTURY* 262, 263 (1947). See also Ronald James Boggs, *Culture of Liberty: History of Americans United for Separation of Church and State, 1947–1973*, at 28–29 (1978) (unpublished Ph.D. dissertation, Ohio State University) (discussing the editorial).

¹⁴⁹ *Now Will Protestant’s Awake?*, *supra* note 148, at 262–63. The editorial was unsigned, but it has been attributed to Morrison, who was then serving as editor. Boggs, *supra* note 148, at 28–29.

¹⁵⁰ CHARLES CLAYTON MORRISON, *THE SEPARATION OF CHURCH AND STATE IN AMERICA* 10 (1947); see also Boggs, *supra* note 148, at 29.

¹⁵¹ Justice Reed was the sole dissenting justice.

¹⁵² F. Ernest Johnson, *Church, School, and Supreme Court*, 17 *RELIGION IN LIFE* 483, 483 (1948).

¹⁵³ *Id.*

always coherent or cohesive. A minority was dogged in defending *McCullum* from the Evangelical charge that the *McCullum* decision furthered “atheism.”¹⁵⁴ However, other mainline leaders admitted that Protestants United’s agenda was at odds with the *McCullum* advancement of secularism and elimination of religion from schools. Morrison, for instance, argued that secularism bred “a religion of its own, whose gods are idols in the form of nationalism, democracy, science, humanism.”¹⁵⁵ Despite this acknowledgment of the danger of the secularism espoused by *McCullum*, these mainline Protestants argued that the protection of *Protestant* liberty from Catholic excesses had to be made on principled grounds. Such a principled opposition called for translating the protestant agenda into broad general terms of state-religion separation, allying with secularists, and putting up with a decision like *McCullum*. This stance of mainline Protestants in the U.S. debates was an unmistakable reenactment of the Dulles-Nolde position in the global ecumenical context.

Evangelicals dissented from the mainline Protestant position to become the staunchest critics of *McCullum*—alongside Catholics. But Evangelicals were hardly the sole Protestant dissenters; notably, the Lutheran theologian Reinhold Niebuhr joined Evangelicals in mounting a critique of the support *McCullum* found in the leadership of Protestants United and the mainline Protestant movement. In words reminiscent of his fiery address at Oxford in 1937, Niebuhr charged that the Court’s “misleading metaphor of separation” would “accelerate the trend toward secularization.”¹⁵⁶ Although Niebuhr’s global ecumenical presence did not extend to religious liberty efforts as Huber’s had, the former joined Evangelicals in mounting a similar critique on mainline Protestant support for *McCullum*. Evangelical dissenters and Niebuhr blamed what Ernest Johnson described as “the unnatural alliance between churchmen and extreme secularists” for the decision.¹⁵⁷ Therefore, to assent to *McCullum* was, in the opinion of this group, to give in to secularism. Not even the mission to curtail Catholic influence was worth such a cost.¹⁵⁸

The rift only widened in the years following *McCullum*. In 1962, the Supreme Court held in *Engel v. Vitale*¹⁵⁹ that school prayers violated the Establishment Clause, delivering a loss to Evangelicals. To the Evangelical movement, *Engel*, which was reaffirmed the following year in *Abington v. Schempp*,¹⁶⁰ was about far more than school devotional exercises; it was about the role of religion in public life. Specifically, Evangelicals regarded the *Engel* and *Schempp* decisions as the expression of a secular humanistic idea that sought to relegate religion to the private sphere.

Most Protestant groups, including Baptists and Presbyterians and organizations such as Protestants United for the Separation of Church and State and the National Council of Churches, endorsed *Engel* and *Schempp*.¹⁶¹ *Christianity Today*, a conservative periodical,

¹⁵⁴ Joseph R. Bryson, “Mending the Breach,” *CHRISTIAN CENTURY* 65, no. 26 (1948), 649–51.

¹⁵⁵ Charles Clayton Morrison, *What Did the Supreme Court Say? An Analysis and Interpretation of the Decision in the McCullum Case Concerning Released Time*, 66 *CHRISTIAN CENTURY* 707, 707 (1949).

¹⁵⁶ See Boggs, *supra* note 148, at 105. See also, Thomas Berg, *Church-State Relations and the Social Ethics of Ronald Niebuhr*, 73 *NORTH CAROLINA LAW REVIEW* 1567 (1995); DONALD MEYER, *THE PROTESTANT SEARCH FOR POLITICAL REALISM* 2–4 (1960).

¹⁵⁷ Johnson, *supra* note 152, at 483.

¹⁵⁸ Boggs, *supra* note 148, at 114. On their part, Catholic bishops called the decision “the shibboleth of doctrinaire secularism,” stating their commitment to work toward the reversal of the decision. Failing to do so, they stated, would be to give in to “the establishment of secularism, the establishment of false religion and the exclusion of God from public life.” *Statement by Catholic Bishops Attacking Secularism as an Evil*, *NEW YORK TIMES*, NOV. 21, 1948, at 63.

¹⁵⁹ 370 U.S. 421 (1962).

¹⁶⁰ 374 U.S. 203 (1963) (holding that Bible reading in schools is unconstitutional).

¹⁶¹ Boggs, *supra* note 148, at 509–13. Protestants United for the Separation of Church and State was divided on *Engel*. While Glenn Archer, the organization’s (first) executive director supported the decision, the vice president, Dick Hall and prominent members such as Louie Newton, Clyde Taylor, and W. Kenneth Haddock opposed it. *Id.* at 510.

argued that the Court's decision in *Engel* was "compatible both with a proper Christian attitude toward government stipulation of religious exercises, and with a sound philosophical view of freedom."¹⁶² Moreover, thirty-one Protestant leaders, including Methodist bishops, the president of the Southern Baptist Convention, and a former president of the National Council of Churches signed a statement lauding the decision for protecting "the integrity of the religious conscience and the proper function of religious and governmental institutions."¹⁶³ Amid this torrent of Protestant support for a decision that already had the backing of prominent Jewish groups, the dissenting groups held out. While Niebuhr had reversed his view to now support the mainline position,¹⁶⁴ fundamentalist Protestants and Evangelicals were steadfast in their opposition.¹⁶⁵ The National Association of Evangelicals not only refused to sign on to the broad support that greeted *Engel* and *Schempp*, it also stringently criticized the decisions as a manifestation of the decreasing significance of religion in public life. Secular humanism, Evangelicals argued, was taking over state and society.¹⁶⁶

Three landmark decisions cemented the Evangelical exodus from the mainline Protestant position and inspired its alliance with Catholics. The first was the Supreme Court's desegregation decision in *Brown v. Board of Education* in 1954, which was followed by the rise of Christian academies. If the *Engel* and *Schempp* de-Protestantization of schools was what Evangelicals opposed, the funding of Christian, white academies, which had first exploded following the *Brown* decision, was what they began to seek. Encapsulating this nexus between the race question and the contestation over religion in the domain of schools, Congressman George Andrews, representing Alabama, fumed in reaction to *Engel*: "They put the Negroes in the schools and now they're driving God out."¹⁶⁷ In securing public funding for these emerging Christian educational institutions and eschewing what they regarded as secularism, Evangelicals found common ground with Catholics—a group that had long operated parochial schools and sought government funding.¹⁶⁸

¹⁶² Editorial, *Supreme Court Prayer Ban: Where Will It Lead?*, CHRISTIANITY TODAY 25, 25 (July 20, 1962); see also John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICHIGAN LAW REVIEW 279, 320 (2001).

¹⁶³ Editorial, *Churchmen Support the Supreme Court*, CHRISTIAN CENTURY (July 18, 1962), at 882, cited in Bernard J. Collins, *The Catholic Church's Position on the Prayer in Public School Issue 4* (2012) (unpublished Master's thesis, Emporia State University).

¹⁶⁴ In 1964, Niebuhr reversed his position on school funding, arguing that American diversity made "common religious observances practically impossible." Reinhold Niebuhr, *Prayer and Justice in School and Nation*, 24 CHRISTIANITY AND CRISIS 93, 95 (1964). Nevertheless, Niebuhr continued to insist that "[c]ompletely secularized education involves the danger of a completely secularized culture." *Id.* See also Berg, *supra* note 156, at 1602.

¹⁶⁵ Prominent Jewish organizations such as the American Jewish Congress, the American Jewish Committee, and the Anti-Defamation League of B'nai B'rith had filed amicus briefs in both cases, arguing that Bible reading and school prayers were unconstitutional.

¹⁶⁶ RICHARD V. PIERARD, *THE UNEQUAL YOKE: EVANGELICAL CHRISTIANITY AND POLITICAL CONSERVATISM* 82 (2006), cited in Jeffries & Ryan, *supra* note 162, at 321. The National Association of Evangelicals and fundamentalist Protestants who dissented from Protestants and Other Americans United for the Separation of Church and State went on to sponsor a proposal to amend the First Amendments to allow for devotional exercises in schools. Boggs, *supra* note 148, at 511. One hundred and fifty resolutions to amend the First Amendment were tabled before Congress in 1964, and a similar proposal by Senator Everett Dirksen (Illinois) had forty-seven co-sponsors. Boggs, *supra* note 148, at 512.

¹⁶⁷ Quoted in *T.R.B. from Washington*, NEW REPUBLIC, July 9, 1962, at 2.

¹⁶⁸ Prior to the school devotional exercises, a long list of confrontations had pitted groups who sought a greater influence for religion in the public sphere against those who advocated for a separation between the spheres. These included the struggles over the teaching of evolution in schools, culminating in the (in)famous Scopes trial, and the debates over the Sabbath. For a discussion of the Scopes trial, see FELDMAN, *supra* note 136, chapter 4. For the Sabbath debates, see Tim Verhoeven, *The Case for Sunday Mails: Sabbath Laws and the Separation of Church and State in Jacksonian America*, 55 JOURNAL OF CHURCH & STATE 55, 71–91 (2013). In terms, however, of the contemporary conflict between Evangelicals and what they regarded as a "secular humanism" bent on displacing Christianity from public life by

The other two landmark decisions that triggered the Evangelical exodus from the mainline Protestant position and catalyzed its embrace of Catholics were the 1965 *Griswold v. Connecticut*¹⁶⁹ decision and the 1973 decision in *Roe v. Wade*.¹⁷⁰ Following *Griswold*'s liberalization of access to contraceptives, the Evangelical perception that religion was being banished from the public square only intensified.¹⁷¹ Hostilities only peaked following *Roe*. Responding to *Roe*, the National Association of Evangelicals declared: "We deplore, in the strongest possible terms, the decision of the U.S. Supreme Court which has made it legal to terminate a pregnancy for no better reason than personal convenience or sociological considerations."¹⁷² Even *Christianity Today*, which had declared the mainline Protestant support for *Engel* and *Schempp*, ran an editorial pronouncing, "[t]his decision runs counter not merely to the moral teachings of Christianity through the ages but also to the moral sense of the American people."¹⁷³

It was the genius of crafting opposition to abortion as a moral and a Christian, rather than a merely Protestant issue, that inspired the alliance between Evangelicals and Catholics.¹⁷⁴ To be sure, Catholics were publicly vocal about their abortion stance long before Evangelicals were. As the Reverend Jerry Falwell pointed out in 1979: "The Roman Catholic Church for many years has stood virtually alone against abortion. I think it's an indictment against the rest of us that we've allowed them to stand alone."¹⁷⁵ Nevertheless, Evangelicals took a stance once *Roe* was handed down, setting aside their ages-long animus against Catholics to ally against a new enemy: "secular humanism." "To understand secular humanism," *Christian Harvest Times*, a Christian magazine, declared in its July 1980 edition, "is to understand women's liberation, the ERA, gay rights, children's rights, abortion, sex education ... the separation of church and state, the loss of patriotism, and many of the other problems that are tearing America apart today."¹⁷⁶

The new Christian coalition was clear that the problem was not merely secular humanism; it was the expression that secular humanism had found in the law. As Canadian-born Lutheran conservative (later turned Roman Catholic), Father Richard John Neuhaus, argued in his influential work, *The Naked Public Square*, the major challenge to religion lay in the secularist legal campaign to expunge religion from the public sphere. As Neuhaus set it out,

wielding the law, scholars suggest that the school prayer debate was the first call to arms. FELDMAN, *supra* note 136, at 190; Jeffries & Ryan, *supra* note 162.

¹⁶⁹ 81 U.S. 479 (1965).

¹⁷⁰ 410 U.S. 113 (1973). This alliance with Catholics in the 1970s itself had precedent on the international plane. By the mid-1960s, the Catholic absence from ecumenical efforts in the years leading to the making of article 18 was replaced by the Catholic Church's embrace of ecumenism, and following that, the church's declaration of support for religious liberty through the 1965 Declaration on Religious Freedom. See Greenberg, *supra* note 61, at 461-79.

¹⁷¹ This impression only deepened with the 1971 *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), requirement that laws have a "secular" purpose.

¹⁷² *Abortion 1973*, NATIONAL ASSOCIATION OF EVANGELICALS, <https://www.nae.net/abortion-1973/> (last visited September 2, 2021).

¹⁷³ Editorial, *Abortion and the Court*, CHRISTIANITY TODAY, Feb. 16, 1973, at 32.

¹⁷⁴ FELDMAN, *supra* note 136, at 193-99.

¹⁷⁵ *Opponents of Abortion March in Cincinnati*, HARTFORD COURANT, June 25, 1979, at 2, quoted in Linda Greenhouse & Rieva B. Siegel, *Before (and After) Roe v. Wade: New Questions about Backlash*, 120 YALE LAW JOURNAL 2028, 2064 (2010). See LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 208 (1992) (discussing public perception of the Catholic character of the pro-life movement after *Roe*), cited in Greenhouse & Siegel, *supra*, at 2052. For the spectrum of religious opinion on abortion before *Roe*, see Greenhouse & Siegel, *supra*.

¹⁷⁶ *Special Report on Secular Humanism vs. Christianity*, CHRISTIAN HARVEST TIMES, July 1980, quoted in Greenhouse & Siegel, *supra* note 175, at 2065 (citing WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA (1996)). Martin describes the source of the quote as simply "a Christian magazine." Martin, *supra*, at 196. Gary Will has identified the source as *Christian Harvest Times*, but he dates the issue to June 1980, while also citing Martin. GARY WILLS, HEAD AND HEART: AMERICAN CHRISTIANITIES 485 (2007).

the task was to “disrupt the business of secular America by an appeal to religiously based public values.”¹⁷⁷ What was striking about the U.S. discourse was that mainline Protestants came to be regarded as part of this “secular America.” Strikingly reminiscent of the Huberian critique of the mainline global ecumenical position, Evangelicals regarded the mainline Protestant alliance with secularists starting from the *McCullum* moment as unholy. Moreover, these critics understood the alliance as a move from Christianity to a belief in the false deity of secularism. To neutralize this secularist enemy, the Evangelical-Catholic coalition began to deploy claims of a Christian preferentialist notion of religious liberty. The unending tussle between Christian preferentialism and legal secularism thus began.

Today, Protestants United has unwittingly lived up to the Evangelical critique. Now known as Americans United, today’s Protestants United is a coalition of multireligious and nonreligious interests and champions a strict separationist agenda. However, contemporary “religious antiliberals”¹⁷⁸ are today’s vanguards of the Evangelical-Catholic project. While these are new renditions of the global debates pitting the Dulles-Nolde views against those of Huber, they are hardly unrecognizable.

Contesting Unchristian Separation

As was the case with early to mid-twentieth-century global ecumenists, the U.S. “religious antiliberals”¹⁷⁹ do not regard secularism as a neutral separation of the state and religion; instead, they consider secularism as the state’s separation from Christianity. These “values Evangelicals,”¹⁸⁰ as the U.S. actors are also known, do not imagine the secularist enemy to be devoid of values. Secularism, in the religious antiliberal discourse, is unchristian—a false faith. Conservative scholar Steven Smith’s arresting work, *Pagans and Christians in the City*, sets out this idea in stark terms.¹⁸¹ Drawing from T. S. Eliot’s prediction of a battle between Christianity and paganism,¹⁸² Smith argues that the contemporary culture wars fulfill Eliot’s thesis. Smith, moreover, argues that the tussle is not new; it is reminiscent of the struggle between early Christians and pagans in the Roman Empire.

“The Idea of a Christian Society,” the T. S. Eliot work that inspired Smith, espoused the vision of the Christian state sought by global ecumenists. As I note above, the ecumenical campaign to make headway in the non-Christian world focused on overcoming religion-state separations that were unfriendly to Christianity. And as noted above, in its 1945 report, *Religious Liberty*, the Joint Committee on Religious Liberty declared the ultimate Christian goal as the constitutional structure of “friendly separations.”¹⁸³ Finding the foremost examples of such friendly separations in the United Kingdom’s affinity with the Church of England and the special status of Christianity in the United States, the report argued that such arrangements are based on voluntary cooperation between the church and state. The Bates-authored report concluded that only such an arrangement would permit the triumph of “free religion.”¹⁸⁴ Only one form of Christian establishment worried ecumenists: the Spanish fascist variety that threatened the freedom of the church. Ecumenists therefore favored the entanglement of church and state.

¹⁷⁷ NEUHAUS, *supra* note 145, at 78. Neuhaus came to the forefront in cementing Evangelical-Catholic ties. FELDMAN, *supra* note 136, at 199.

¹⁷⁸ Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 5, at 1359.

¹⁷⁹ *Id.*

¹⁸⁰ See FELDMAN, *supra* note 136, chapter 6.

¹⁸¹ SMITH, *supra* note 5.

¹⁸² See Eliot, THE IDEA OF A CHRISTIAN SOCIETY, *supra* note 85.

¹⁸³ BATES, *supra* note 100, at 374.

¹⁸⁴ *Id.* at 374, 375–77. See also the discussion above, in the section headed “Contesting ‘Secularism’ and ‘Islamic Orthodoxy.’”

This ecumenical attitude reflected ecumenical advocacy in colonial territories, as well. Peter Van der Veer's work on India shows that the missionary campaign for the empire's separation from indigenous religions was not a manifestation of a commitment to separation. Instead, it was the last resort of activists who preferred an alliance with the state but were willing to settle for the state's separation from its rival if that was the only option available.¹⁸⁵ In Muslim West Africa, the origins of colonial rule lay in empire-missionary ties.¹⁸⁶ As Thomas Foxwell Buxton—evangelical and the brains behind the African Colonization expedition—envisioned, Christianity was to drive both the civilizing and economic aspirations of the empire. The preference for Christianized states and a Christianized world, in sum, motivated ecumenists.

Regardless of the wall of separation metaphor that has come to be associated with the Establishment Clause in the United States, scholars argue that the clause was not originally intended to separate the state from religion.¹⁸⁷ Not only did several states have established churches at the adoption of the First Amendment, but many also promoted Protestantism through various devices. Of the fourteen states in existence at the making of the Establishment Clause, seven maintained and sponsored a state church, and several others advanced denominations of Protestantism in various ways. Even the much-touted beacon of religious liberty, Rhode Island, excluded Catholics and Jews, as such, from citizenship.¹⁸⁸ As Jeffries and Ryan point out, a “Protestant establishment ... dominated public life,” even if that establishment was “unselfconscious.”¹⁸⁹ Given this de facto Protestant establishment, Protestants generally saw no disconnect between Christian free exercise and the Establishment Clause.¹⁹⁰ Protestants vigorously deployed church-state separation arguments in furtherance of anti-Catholic animus in the decades preceding the Evangelical-Catholic alliance. In its stance on religion-state separation, the National Association of Evangelicals, for instance, favored “strict separation of church and state especially as the state might interrelate with Roman Catholic Church.”¹⁹¹ The critique of unchristian secularist separation replaced the ostensibly unequivocal Evangelical commitment to separation. The shift, as I argue above, was driven by the common interest Evangelicals and Catholics found in the public funding of parochial schools following the rise of Christian academies in the aftermath of *Brown*, *Engel*, and *Schempp* and by intensified fears of a purge of Christian values from public life following *Griswold* and *Roe*.

Paradoxically, the decline in Evangelical support for church-state separation was justified by the idea of church-state separation itself. As Ernest Johnson argued in the aftermath of *McCullum*, church-state separation was a constitutional arrangement that could be

¹⁸⁵ VAN DER VEER, *supra* note 27.

¹⁸⁶ THOMAS FOXWELL BUXTON, *THE AFRICAN SLAVE TRADE AND ITS REMEDY* (1840). See also Akande, *supra* note 55; See EMMANUEL AYANKANMI AYANDELE, *THE MISSIONARY IMPACT ON MODERN NIGERIA, 1842–1914: A POLITICAL AND SOCIAL ANALYSIS* (1966).

¹⁸⁷ See Jeffries & Ryan, *supra* note 162, at 292.

¹⁸⁸ The Establishment Clause was therefore more likely intended to prevent federal government interference with the state-religion entanglements in the different states rather than to separate the state from religion. See Jeffries & Ryan, *supra* note 162, at 292. GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 13 (1987); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 74 (1986); Brett G. Scharffs, *Protecting Religious Freedom: Two Counterintuitive Dialectics in US Free Exercise Jurisprudence*, in *FREEDOM OF RELIGION UNDER BILLS OF RIGHTS* 285 (Paul Babie & Neville Rochow eds., 2012). See also STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 17–34 (1995); Kurt T. Lash, *The Second Adoption of the Establishment Clause*, 27 *ARIZONA STATE LAW JOURNAL* 1085, 1088–89 (1995).

¹⁸⁹ Jeffries & Ryan, *supra* note 162, at 283; see also Sullivan et. al., *supra* note 5.

¹⁹⁰ Jeffries & Ryan, *supra* note 162, at 281–82; see also Sullivan et. al., *supra* note 5.

¹⁹¹ Boggs, *supra* note 148, at 9. The favorite ground for that Protestant campaign was government funding of Catholic private schools. See FELDMAN, *supra* note 136, chapter 2; Jeffries & Ryan, *supra* note 162, at 297–318. See *Everson v. Board of Education*, 330 U.S. 1 (1947).

secularist or Christian. Secularist separation sought to “defend the state against religion”¹⁹² and was therefore unchristian. Another form of separation was praiseworthy: that which sought to protect religion against the state. This form of separation, reminiscent of the “friendly separations” championed by Bates on the global ecumenical scene, was what the Christian coalition advocated.

This critique of secularist separation and simultaneous embrace of “friendly separations” finds expression in the contemporary discourse of former attorney general Barr. Barr’s position advocates an interpretation of the establishment clause that dissolves the wall of separation when it benefits the church and invokes noninterference to erect the wall when expedient. Reflecting its favor for this project, the Supreme Court’s jurisprudence on government funding of parochial schools now regards the disqualification of religious schools from state funding as unconstitutional.¹⁹³ Free exercise, in essence, trumps separationist concerns in the arena of parochial schools’ funding. However, this has not translated into a blanket hostility to separation; like global ecumenists, contemporaries such as Barr have not hesitated to deploy separationist notions to advance the interests of the Christian coalition. A notable example has been in the doctrine of ministerial exemptions, where the coalition has successfully promoted the legal principle exempting internal governance questions of religious organizations from government interference. *Our Lady of Guadalupe v. Morrissey-Berru*,¹⁹⁴ involving a discrimination claim by two elementary school teachers against their Roman-Catholic employers, is a recent expression of the favor this campaign has found with the Supreme Court.¹⁹⁵ Writing for the majority, Justice Alito held that the First Amendment prohibits “intrusion” into “matters of church government,” and he concluded that deciding the question brought by the plaintiffs would “risk judicial entanglement in religious issues.”¹⁹⁶ This was despite the fact that the entanglement test had, since *Lemon v. Kurtzman*, been deployed in furtherance of the secularist separation abhorred by the Christian coalition.¹⁹⁷ Church-state separation was, in its *Guadalupe* rendition, on the side of the church. This deployment of separation for the ends of the church has been made possible by the emergence of a notion of religious liberty staunch in its faithfulness to the Christian project, a point I turn to below.

The Two Faces of Liberty

The global ecumenical religious liberty campaign was expressly premised on the argument that Christians were a religious minority in the colonies. As noted above, once ecumenists failed to secure an alliance with the state and turned to religious liberty to contest the state’s false faith, they began to invoke the political and religious minority status of Christians as a justification for special protections. This argument was put to good use in deliberations over Article 18. To take a case in point: when making a case for Nigeria’s domestication of

¹⁹² Johnson, *supra* note 152, at 483.

¹⁹³ *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

¹⁹⁴ 140 S. Ct. 2049 (2020).

¹⁹⁵ One petitioner alleged age discrimination, and the other argued that her employment had been terminated because she had sought a medical leave to treat breast cancer. *Id.*; see also *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012).

¹⁹⁶ *Our Lady of Guadalupe*, 140 S. Ct. at 2060, 2055, 2069.

¹⁹⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The doctrine was first articulated explicitly in *Walz v. Tax Commission*, 397 U.S. 664 (1970), which involved an establishment challenge to a New York constitutional provision granting tax exempt status to religious organizations with regards to property used for “religious, educational or charitable purpose.” The Supreme Court upheld the law’s constitutionality, holding that “exempting churches from taxes involved less entanglement than taxing them.” *Walz*, 397 U.S. at 674–75. See Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA LAW REVIEW 1195 (1979).

Article 18, Sir Kenneth Grubb, chair of the Commission for the Churches on International Affairs, argued that the provision was a guarantee intended to protect Christians and indigenous non-Muslim groups—the target of much missionary proselytization—from the Muslim majority. Ecumenical justifications for the need for Article 18 not only sidelined the horror of the Holocaust,¹⁹⁸ but they also left out Muslim and non-Muslim minority groups facing severe persecution in the Muslim African territories with which ecumenists were concerned.¹⁹⁹ Grubb's assertions also obscured the clout of missions and Christian converts in the colony. Although missions never returned to the dominion they enjoyed at the height of their nineteenth-century alliance with the empire; they continued to command varying degrees of influence within the colonial administration. This influence produced significant policy victories, especially in the years leading to decolonization—a period during which the postcolonial state's constitution was designed with the active involvement of missions.²⁰⁰

It is now common to hear declarations that the U.S. Christian coalition is a religious minority identity. Not merely an assertion, this identity has proved useful in securing legal victories. The legal strategy sprang from the recognition that Supreme Court jurisprudence on free exercise developed in the context of the protection of religious minorities. The star of that story was eminent conservative scholar Michael W. McConnell, and the case was *Rosenberger v. Rectors and Visitors of the University of Virginia*.²⁰¹ In *Rosenberger*, the University of Virginia denied a student application for monies intended to fund an Evangelical magazine *Wide Awake*. The source of the funding sought was the student activities fund, which was collected through mandatory student contributions. The university's decision to deny the funding request was based on an Establishment Clause-inspired policy prohibiting funding religious purposes. Represented by Professor McConnell, the Plaintiff argued that the university's decision infringed on the Establishment Clause because it amounted to viewpoint discrimination. This was a novel argument. As Noah Feldman tells the story, McConnell's genius lay in instrumentalizing the sympathy that both the Supreme Court and groups who favored secularist separation tended to express in free exercise cases involving minorities.²⁰² This was, however, not a free exercise case, and that sympathy had to be transposed to the context of the Establishment Clause. On the way from the Free Exercise Clause to the Establishment Clause, McConnell branched off at free speech doctrine, extrapolating the prohibition on viewpoint discrimination in that context. The Court agreed with McConnell, holding that funding *Wide Awake* would not amount to an Establishment

¹⁹⁸ See Moyn, *Personalism, Community, and the Origins of Human Rights*, *supra* note 91, at 86 (arguing that “For almost nobody” was the post-World War II human rights system the “essence of post-Holocaust wisdom”).

¹⁹⁹ For instance, when the British colonial government established a commission to investigate claims of religious intolerance and minority abuses, the issue of restrictions on missionaries were central to the commission's hearings. NIGERIA: REPORT OF THE COMMISSION APPOINTED TO ENQUIRE INTO THE FEARS OF MINORITIES AND THE MEANS OF ALLAYING THEM, 1958, Cmnd, 505, at 64–66 (UK). On the colonial state's repression of Muslim minority groups, see R. A. Adeleye, *Mahdist Triumph and British Revenge in Northern Nigeria: Satiru 1906*, 6 JOURNAL OF THE HISTORICAL SOCIETY OF NIGERIA 193 (1972). Describing the aftermath of a colonial expedition on a Muslim minority village in Northern Nigeria, Burdon, an assistant colonial resident, reported that “No wall or tree was left standing.” Letter from Frederick Lugard to Colonial Office, March 14, 1906, CO446/53, The National Archives (UK). One British soldier said of the casualties: “I calculate that the number of corpses left in the town ... was 350 ... and Dr Ellis when walking across the country in the evening in a straight line ... counted 73 corpses. Major Green considers that the M. I. killed 150 to 160, which would bring the total to about 500. Natives ... say that the enemy's losses were more than double this, and I daresay, I am making a low estimation.” Letter from Robert Goodwin to Frederick Lugard, March 11, 1906, CO446/59, The National Archives. The colonial government then went on to convict and execute several survivors.

²⁰⁰ Akande, *supra* note 55.

²⁰¹ 515 U.S. 819 (1995).

²⁰² FELDMAN, *supra* note 136, at 208.

Clause violation; to deny the publication funding from a generally available student fund amounted to discriminating against the viewpoint espoused by the publication.²⁰³

Legal arguments springing from the premise that the Christian coalition is a religious minority remain alive today, finding renewed expression on the Court. Dissenting in *Obergefell*, Justice Alito predicted that the decision would be used to “vilify Americans who are unwilling to assent to the new orthodoxy.”²⁰⁴ Speaking at a Catholic Lawyer’s Association event two years later in March 2017, Justice Alito declared: “We are seeing this coming to pass. A wind is picking that is hostile to those with traditional moral beliefs.”²⁰⁵ Barr was, therefore, not without precedent when he spoke in his 2019 Notre Dame speech of religious persecution. “Those who defy the creed” of secularism, Barr warned, “risk a figurative burning at the stake—social, educational, and professional ostracism and exclusion waged through lawsuits and savage social media.”²⁰⁶ The Court appears to have agreed. In *Masterpiece Cakeshop*, the Court held that Colorado’s Civil Rights Commissioners’ disparaging remarks about the petitioner’s religious objections to same-sex weddings evinced a hostility that tainted the commission’s proceedings. The hostility, the Court concluded, amounted to religious viewpoint discrimination and infringed on the petitioner’s free exercise rights.²⁰⁷

At the same time, however, the Court declined to uphold the same standard less than three weeks later in considering the constitutionality of the presidential proclamation banning travel to the United States from several Muslim majority states in *Trump v. Hawaii*.²⁰⁸ Remarkably, the Christian coalition took no stance on the outcome of *Hawaii*. Although the Christian Legal Society and the National Association of Evangelicals filed an amicus brief arguing that the Establishment Clause prohibited intentional discrimination among religions, the brief was limited to the legal principle—which undoubtedly advanced the position of the Christian coalition.²⁰⁹ Unlike a wide range of religious groups who filed briefs in opposition to the travel ban, several of whom also actively supported the legal separation of church and state, the Christian coalition refrained from taking a position on the outcome of the case.²¹⁰

In a dissent joined by Justice Ginsburg, Justice Sotomayor juxtaposed the Court’s *Hawaii* decision with its stance in *Masterpiece Cakeshop*, pointing out that both cases raised the question “whether a government actor exhibited tolerance and neutrality.” In *Masterpiece*, Sotomayor argued, the Court had considered officials’ hostile “statements about religion” to

²⁰³ *Rosenberger*, 515 U.S. at 845–46; see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

²⁰⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting).

²⁰⁵ David Porter, *Justice Alito Says Country Increasingly “Hostile” to Traditional Moral Beliefs*, CHICAGO TRIBUNE, March 15, 2017, <https://www.chicagotribune.com/nation-world/ct-justice-alito-religious-liberty-20170315-story.html>.

²⁰⁶ Barr, *supra* note 1.

²⁰⁷ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1723–24 (2018).

²⁰⁸ 138 S. Ct. 2392 (2018).

²⁰⁹ Brief for Christian Legal Society and National Association of Evangelicals as Amici Curiae Supporting Neither Party, *Trump*, 138 S. Ct. 2392.

²¹⁰ These groups included the American Jewish Committee, Anti-Defamation League, Central Conference of Rabbis, Women of Reform Judaism, Episcopal Bishops, Muslim Justice League, and the Muslim Public Affairs Council. Significantly, the United States Conference of Catholic Bishops also filed a brief in opposition to the ban. This is not to assert that the Christian coalition has not advanced the legal interest of any religious minority. Notably, the *Employment Division v. Smith*, 494 U.S. 872 (1990), decision (holding that the denial of state unemployment benefits to a worker fired for using illegal drugs for a religious purpose did not amount to a violation of the Free Exercise Clause) saw the Christian coalition and its legal titans like McConnell, alongside several religious and nonreligious groups, flock to the side of the religious minority whose free exercise rights had been curtailed. See FELDMAN, *supra* note 136, at 209–10; Winnifred Fallers Sullivan, *The World that Smith Made*, in *POLITICS OF RELIGIOUS FREEDOM*, *supra* note 5, at 234. Widespread opposition to the *Smith* decision eventually culminated in Congress’s enactment of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4, three years later.

be “persuasive evidence of unconstitutional government action” amounting to a violation of the “neutrality” required by the Free Exercise Clause. However, in *Hawaii*, the majority “completely sets aside the president’s charged statements about Muslims as irrelevant.” This double standard, the dissent charged, “tells members of minority religions in our country ‘that they are outsiders, not full members of the political community.’”²¹¹ The Sotomayor dissent, in sum, pointed out the Court’s Christian preferentialism. Far from new, this Christian preferentialist bent in the Court’s jurisprudence perpetuates the view, at least since Justice Brewer’s well-known 1892 declaration in *Holy Trinity*,²¹² that the United States “is a Christian nation.”²¹³ Neither is U.S. Christian preferentialism a distinctly national phenomenon; regardless of the peculiarities of its U.S. manifestation, the global ecumenical religious liberty project lives on in the arguments for U.S. Christian preferentialism.

Conclusion

The global ecumenical struggle reached a climax with the triumph of Article 18 in 1948, but the afterlife of that project continues to reverberate. Indeed, the ecumenical arguments that brought forth Article 18 continue to serve as a resource for contemporary U.S. religious antiliberals contesting secularism. When Barr decried the “organized destruction” being unleashed on religion by “militant secularism” and charged coreligionists to “resist” “the war being waged on religion,”²¹⁴ he was echoing precedent in the intellectual tradition of his global ecumenical forbears. The United States is not alone. Across the Atlantic, Europe is witnessing similar confrontations even if those are not always animated by the anxieties that plague the United States. Concurring in the European Court of Human Rights’ *Lautsi v. Italy* decision endorsing the display of crucifixes in classrooms, for instance, Justice Bonello articulated the European counterpart of Barr’s campaign through a reference to the domesticated equivalent of Article 18 in the European Convention.²¹⁵ “Freedom of religion,” Bonello argued, “is not secularism. Freedom of religion is not the separation of Church and State ... In Europe, secularism is optional, freedom of religion is not.”²¹⁶ The European struggles only resonate more deeply when one compares the *Lautsi* decision with the European Court’s deployment of secularism (“interdenominational neutrality”) to proscribe a Muslim public school teacher from wearing a headscarf in an earlier case.²¹⁷ This genealogical account recovers the longer global history of this contemporary manifestation of religious antiliberalism.

This genealogical account also unmasks the instability of the ideas of secularism and religious liberty. The campaign for a Christian-friendly religious liberty was not imagined to clash with a hollow religion-state separation constitutional structure; global ecumenists conceived of state separation from Christianity as a turn to false faiths. Secularism was therefore a competing religion, manifesting as Islam in British Muslim Africa and later, as communism and German national socialism in Europe. In the same way, U.S. religious antiliberals regard secularism as a false orthodoxy and respond by advancing a notion of religious liberty that centers the Christian experience. By unveiling the emergence of

²¹¹ *Trump*, 138 S. Ct. at 2477 (Sotomayor, J., dissenting) (quoting *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309 (2000)).

²¹² *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

²¹³ See Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 5, at 1398. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

²¹⁴ Barr, *supra* note 1.

²¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 222.

²¹⁶ *Lautsi v. Italy*, 2011-III Eur. Ct. H.R. 61 (2011).

²¹⁷ *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447 (2001).

Christian preferentialism in specific response to an unfriendly secularism in both the early global ecumenical campaign and in the current U.S. project, I question the faithfulness of the commitment to religious liberty and of a principled aversion to secularism.

In the end, however, the crux of this narrative is not merely to highlight the disconnect between the idealized notions of secularism and religious liberty and the expression they find in particular struggles. Instead, it is to reveal the impossibility of understanding these ideas outside of the context of specific encounters. It is in these encounters that the political conditions that galvanize these ideas and the changing relations that inspire their transformations are unveiled. Only with that discovery, I conclude, can one hope to begin to grasp the complexity of law's relationship with faith and power.

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