

RELIGIOUS SYMBOLS AND SECULAR GOVERNMENT

*Steven D Smith**

That a ‘secular’ government should not sponsor religious expressions may seem almost like an analytic truth. And yet, in practice, liberal democratic governments often support religious symbols and expressions. So, are governments that purport to be secular and yet support religious symbols or expressions just being hypocritical, or incoherent? This article, written for a conference on ‘Freedom from Religion’ held in Tel Aviv in December 2011, considers three different versions of secularity – what I call the ‘classical’, ‘comprehensive’ and ‘agnostic’ versions – and concludes that none of these versions forbids religious expressions by ‘secular’ governments.

Keywords: religion, secularism, symbols, endorsement, liberalism

1. INTRODUCTION

Liberal democratic governments are supposed to be, and often declare themselves to be, ‘secular’.¹ Must governments that lay claim to this description refrain from sponsoring religious symbols or expressions? We might naturally suppose that to say that a ‘secular’ government should not sponsor religious expressions may seem almost like an analytic truth, akin to the truth that bachelors are unmarried. And yet, in practice, liberal democratic governments often support religious symbols and expressions, as the recent Italian cross case² and the American cross, Ten Commandments and Pledge of Allegiance cases³ reflect.

So, what should we make of this puzzling combination of profession and practice? Are governments that purport to be secular and yet support religious symbols or expressions just being hypocritical, or incoherent? Are they deviating from principle under the crushing weight of tradition or the crude pressure of public opinion? Such diagnoses are familiar enough, but they are too simplistic; or so I will argue in this article. I will argue that there is no simple or across-the-board answer to the question of governmentally sponsored religious symbols and expressions. As they say, it all depends. Religious symbols and expressions sometimes may be unsuitable for a secular government but, depending on the facts and the context, they may also be permissible, or appropriate, or even commendable.

* Warren Distinguished Professor of Law, University of San Diego. smiths@sandiego.edu

¹ cf Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Jane Marie Todd tr, Harvard University Press 2011) 2 (describing a ‘broad consensus that “secularism” is an essential component of any liberal democracy composed of citizens who adhere to a plurality of conceptions of the world and of the good’). For discussion of the prevalence and difficulties of this assumption, see Steven D Smith, ‘The Plight of the Secular Paradigm’ (2013) 88 *Notre Dame Law Review* (forthcoming).

² *Lautsi v Italy* App No 30814/06 (ECtHR, 18 March 2011).

³ *Salazar v Buono* 559 US (2010); *Van Orden v Perry* 545 US 677 (2005); *Elk Grove Unified School District v Newdow* 542 US 1 (2004).

2. THREE VERSIONS OF 'SECULAR'

We should start with some distinctions. Government, we are assuming, is supposed to be 'secular', but what does 'secular' mean? Scholars increasingly recognise that 'secular' is a many splendoured notion,⁴ but among the various kinds or conceptions we can pick out three, which we might call the 'classical', 'comprehensive' and 'agnostic' versions of secularity.

The first of these versions, dominant in the Middle Ages but less common today, understands the term 'secular' as one compartment or subcategory within a more encompassing reality.⁵ More specifically, 'secular' means something like 'in and of this world', and the term serves to distinguish the this-worldly or temporal domain from a different world or dimension of reality, described with adjectives like 'spiritual' or 'eternal'. A 'secular' ruler – a king or prince – has jurisdiction over affairs of *this* world. It is not the ruler's responsibility to ensure the salvation of souls in the next world; that is the business of the church.

In this version, 'secular' emphatically does not mean 'not religious'. Rather, 'secular' gets its meaning from a larger framework that we would be likely to perceive as religious. So 'secular' is itself, in a sense, a religious term.⁶ Here is an illustration. In the medieval world (and perhaps still) Catholic priests are classified into two categories, described as the 'secular' and the 'regular' clergy. 'Secular' priests are not wayward or apostate clerics who have forsaken the faith while keeping their collars; rather, they are priests who work *in the world*, in a parish, in contrast to those who withdraw from the world to live under the *'regula'* of a monastery. In the same way, secular rulers are supposed to concern themselves with the affairs of this world, but it in no way follows that they should refrain from acting on or expressing religious beliefs that are relevant to this-worldly affairs.

Although this usage is still available, it has been to a significant extent displaced in modern times by a different usage which treats 'secular' simply as meaning 'not religious'.⁷ So a 'secular' institution – or theory, or reason – would be an institution or theory or reason that is 'not

⁴ See, eg, Craig Calhoun, Mark Juergensmeyer and Jonathan VanAntwerpen (eds), *Rethinking Secularism* (Oxford University Press 2011); Michael Warner, Jonathan VanAntwerpen and Craig Calhoun (eds), *Varieties of Secularism in a Secular Age* (Harvard University Press 2010).

⁵ For an illuminating discussion, see Nomi Stolzenberg, 'The Profanity of Law' in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *Law and the Sacred* (Stanford University Press 2007) 29, 35. See also Steven D Smith, *The Disenchantment of Secular Discourse* (Harvard University Press 2010).

⁶ See Stolzenberg *ibid* 30–31:

'The secular' was, in fact, originally a *religious* concept, a product of traditional religious epistemological frameworks. The concept of the secular always served the function of distinguishing religious from nonreligious domains. But nonreligious domains did not, in the premodern view, exist outside the religious epistemological framework. On the contrary, that framework of meaning was all-encompassing, overarching, comprehending within it *every* domain of human (and nonhuman) action and cognition, both the spiritual and the temporal, the holy and the unholy, the ecclesiastical and the secular, the sacred and the profane.

⁷ cf John Ayto, *Dictionary of Word Origins: Histories of More Than 8,000 English Language Words* (Arcade 1990) 465:

secular Latin *saeculum*, a word of uncertain origin, meant 'generation, age'. It was used in early Christian texts for the 'temporal world' (as opposed to the 'spiritual world') ... The more familiar modern English meaning 'non-religious' emerged in the 16th century.

religious'. But what, if anything, does this 'not religious' stance entail or imply about the status of 'religion'? One possibility is that a secular position denies or rejects religion or – what arguably amounts to the same thing – engulfs and subsumes it. So a secular thinker would be one who believes that religious views are false or without value – a Daniel Dennett or a Christopher Hitchens. Or, like many a social scientist, the secular thinker may acknowledge religion (and perhaps even purport to value it, or even to believe in it) while also maintaining that religion can be fully accounted for in secular terms – in the ways of understanding practised in disciplines like sociology, anthropology and psychology.

This version of secularity may be called 'comprehensive' because it maintains that everything that is real and true can be adequately accounted for in secular (meaning non-religious) terms. Such a view is evident in the scientific naturalism that pervades a good deal of academic thought.⁸ Whereas in the classical version, the 'secular' was a subcategory within a larger 'religious' framework, in the 'comprehensive' version of secularity the relation is reversed: 'religion' is a somewhat shady subcategory of a larger reality that is not itself religious. If the classical account makes the secular religious, the comprehensive account renders religion secular.

But, then again, the secular thinker might be more modest in his claims. He might acknowledge the existence of religious views and ways of life and decline to judge one way or the other whether these views and ways are true or valuable or reducible to non-religious terms. His confidence, probably, is in the non-religious approach to matters – the approach of science, perhaps, or philosophy. Such non-religious domains, he thinks, are where reliable knowledge resides. But he concedes the *possibility* of truths and realities that transcend and elude these approaches. We might call this third position 'agnostic' secularism; though not religious, it remains non-committal with respect to the truth or value of religion.

3. WHICH KIND OF SECULARITY?

Thus far we have distinguished between three different versions of secularity, which I have called the classical, comprehensive and agnostic versions. So, which if any of these versions describes the position that a government committed to being 'secular' ought to take today?

One familiar way to approach this question is to start with the classical worldview that characterised medieval societies in the West and then ask how the world changed with the break-up of

⁸ Hilary Putnam describes the common practice by which philosophers ... announce in one or another conspicuous place in their essays and books that they are 'naturalists' or that the view or account being defended is a 'naturalist' one; this announcement, in its placing and emphasis, resembles the placing of the announcement in articles written in Stalin's Soviet Union that a view was in agreement with Comrade Stalin's; as in the case of the latter announcement, it is supposed to be clear that any view that is not 'naturalist' (not in agreement with Comrade Stalin's) is anathema, and could not possibly be correct.

Hilary Putnam, 'The Content and Appeal of "Naturalism"' in Mario de Caro and David MacArthur (eds), *Naturalism in Question* (Harvard University Press 2004) 59, 59.

Christendom.⁹ So let us consider three different ‘post-Christendom’ interpretations or scenarios. In the first scenario, with the disintegration of Christendom the power of the Church declines, and Christianity fractures into contending factions of Catholics, Lutherans, Calvinists, Anabaptists, Anglicans, and so forth. But everyone, or nearly everyone, in Western civilisation is still Christian or Jewish, or at least monotheistic in one form or another.

In this scenario, ‘secular’ might continue to bear something like its classical meaning. Despite serious theological disagreements, most everyone still believes that both this life and the life to come are real but distinguishable, and the term ‘secular’ could still serve to indicate that distinction. A ‘secular’ government, while concerning itself with this-worldly matters, would still be free or perhaps even obligated to act upon relevant religious truths, and to acknowledge the religious framework that establishes the limits of government’s secular jurisdiction.

Now consider a second scenario. Suppose that the break-up of Christendom leads not just to religious fragmentation but also, over time, to a decisive decline in religious faith. The development of the Enlightenment and the progress of science eventually attract most people to the view that the only kinds of reality that exist are the material, empirical realities accessible to scientific study. Older beliefs about God, spirit, heaven and resurrection come to seem like antiquated superstitions. In this scenario, it seems that ‘secular’ governments would naturally abandon the classical position in favour of a comprehensive secularism. Such governments might still try to accommodate any remaining dissenters who cling to now discredited faiths. But most people, or at least most right-thinking people, now understand that the natural or material world – the ‘secular’ world – is all there is, and government ought to respect and operate on that understanding.

It also might turn out, though, that many or most people, though largely bereft of religious faith, are more restrained in their affirmations and negations. They are not confident that there is a God or a spiritual or eternal domain; but then again, they are not confident that there is not. They answer the question of religious truth with, as Paul Horwitz puts it, the ‘eternal maybe’.¹⁰ In this scenario, people might favour a less cocksure, more agnostic version of secularity. And they might naturally desire that government operate in accordance with that more qualified or modest view of things.¹¹

So, depending on the facts, there could be governments – ‘secular’ governments – that would gravitate to any of the versions of secularity: classical, comprehensive or agnostic. We can imagine any of these possibilities. But enough of ‘could be’: what *are* the facts, really? Which of these scenarios best describes the world *we* live in?

The answer to this question may vary from place to place and time to time. But it seems safe to say this much: at least in Western nations, each scenario captures some but not all of the social reality.

⁹ For an instance of this approach, see John Rawls, *Political Liberalism* (paperback edn, Columbia University Press 1996) xxiv–xxviii.

¹⁰ Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* (Oxford University Press 2011) 75.

¹¹ Horwitz’s book is an effort to articulate what that approach would entail: *ibid.*

In the immediate aftermath of the Protestant Reformation, the nations composing what had been Christendom probably came close to fitting scenario one. Nearly everyone was a theist of some kind – most often some kind of Christian. Later, especially in the nineteenth and early twentieth centuries, most scholars and theorists foretold the development of something like scenario two: as science and modernity advanced, religious belief would fade.¹² As late as 1968, Peter Berger predicted that ‘[b]y the 21st century, religious believers are likely to be found only in small sects, huddled together to resist a worldwide secular culture’.¹³ By now it is widely recognised, though, that these secular prophecies have not been fulfilled: religion has not dwindled away. By century’s end, Berger told a different story. ‘The assumption that we live in a secularized world is false’, Berger declared.¹⁴

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

‘Essentially mistaken’, maybe, but not wholly and utterly mistaken. The numbers of non-believers have grown.¹⁵ And these non-believers – or believers in a comprehensive naturalism – are well placed; as Berger indicates, in some cultural neighbourhoods (like universities), and in some regions (like Europe), *theirs* seems to be the dominant orthodoxy. Even where religion persists, moreover, it is one option among many.¹⁶ And, as Charles Taylor has argued, a belief that is understood to be both optional and embattled is not the same sort of innocently self-confident thing as a belief that is taken as axiomatic.¹⁷

If citizens of modern democracies were required to cast their lots with one of the three views, it seems likely that most citizens would align themselves with either the ‘classical secular’ or the ‘comprehensive secular’ position. The percentages would differ: in the United States, where most

¹² José Casanova explains:

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

José Casanova, *Public Religions in the Modern World* (The University of Chicago Press 1994) 17.

¹³ Peter Berger, ‘A Bleak Outlook is Seen for Religion’, *The New York Times*, 25 February 1968, 3.

¹⁴ Peter L Berger, ‘The Desecularization of the World: A Global Overview’ in Peter L Berger (ed), *The Desecularization of the World: Resurgent Religion and World Politics* (Ethics and Public Policy Center 1999) 1, 2, 9–10.

¹⁵ See Daniel O Conkle, ‘Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty’ (2010–11) 32 *Cardozo Law Review* 1755, 1771–73.

¹⁶ See, eg, Charles Taylor, *A Secular Age* (Belknap Press of Harvard University Press 2007) 539 (suggesting that ‘it [is] so hard to believe in God in (many milieux of) the modern West, while in 1500 it was virtually impossible not to’).

¹⁷ This thesis runs through Taylor’s lengthy book: *ibid.*

people claim to be religious,¹⁸ more citizens (outside of universities) would probably favour something like the classical view, while in Europe the proportions might be reversed. Self-identifying agnostics would probably be a small minority. And yet, if Taylor is right, an aura of agnosticism would hover over the voting, affecting even many of those who endorse the classical or comprehensive views.

4. SECULAR GOVERNMENT AND RELIGIOUS EXPRESSION

The question we began with was whether a ‘secular’ government could or should sponsor religious symbols or expressions. We noted that to many thinkers it may seem to be something akin to an analytic truth that a ‘secular’ government would not sponsor such symbols or expressions. So the fact that ostensibly secular governments often *do* engage in such expression stands as proof of hypocrisy or inconsistency. But the ensuing discussion suggests that the issue is not so simple.

4.1 DIVERGENT IMPLICATIONS

We have seen that secularity comes in different forms or versions. And the different versions have different implications for the relationship between a secular position and religious expression.

We have already observed that in the time and realm of what is sometimes called Christendom, the classical version prevailed. Kings and princes were ‘secular’ rulers; they had jurisdiction over the here and now of this world. But it was understood that this temporal or secular jurisdiction was nestled within a larger reality that we might describe as religious. In that classical arrangement, not only *could* secular rulers acknowledge and affirm religion (in various ways), they were effectively *bound to* affirm at least some religious beliefs. For one thing, temporal or secular did not form a dichotomy in which ‘religious’ was the other term; rather, religion pervaded life on both sides of the ‘spiritual/temporal’ divide. So there was hardly any escaping from religion (although the very pervasiveness of ‘religion’ may have meant that the concept was superfluous and ill-suited for picking out any particular area or dimension of reality¹⁹). In addition, the jurisdictional boundaries that defined the rulers’ proper domain were themselves ‘religious’ in character; so secular rulers would, of necessity, recognise and appeal to ‘religious’ understandings and propositions in determining the limits of their own power.

¹⁸ For a recent study, see Robert D Putnam and David E Campell, *American Grace: How Religion Divides and Unites Us* (Simon and Schuster 2010) 7.

¹⁹ William Cavanaugh observes that in the Middle Ages ‘*religio* was not a separate sphere of concern and activity, but permeated all the institutions and activities of medieval Christendom’: William T Cavanaugh, *The Myth of Religious Violence* (Oxford University Press 2009) 68. Consequently, ‘religion’ did not designate some category of beliefs or practices in the way it is thought to do today. ‘There was a time when religion, as modern people use the term, was not’, Cavanaugh asserts, ‘and then it was invented’: *ibid* 81.

Conversely, a government committed to comprehensive secularism would not endorse religion. But it might well criticise, or denounce, or even suppress religious institutions, traditions or beliefs. Some Marxist political systems of the last century were examples of this stance, as is the secular Mexican regime depicted in Graham Greene's *The Power and the Glory*.²⁰

It might seem, by contrast, that a government committed to agnostic secularism would refrain from saying or conveying anything one way or the other about religion. But that conclusion would be mistaken, for two reasons. First, agnosticism does not entail silence with respect to religion. An agnostic individual need not refrain from talking about, and making assertions about, religion.²¹ On the contrary, an agnostic is likely to believe, and assert, that the evidence and arguments that have been offered both for and against religion, or for and against the proposition that God exists, are inconclusive. This is a claim *about* religion; moreover, it is a claim that contradicts the contrary claims both of many religionists (who believe that the evidence and arguments *for* God are persuasive and sufficient) and of more hard core atheists (who believe that the arguments *against* God are persuasive and sufficient). Like an agnostic individual, an agnostically secular government might make these sorts of (controversial) statements about religion. And from the more devoutly atheistic standpoint, even these sorts of respectfully agnostic statements (asserting that religion *might be* true, or valuable) could look like statements favourable to religion.²²

Agnostic secularism will also reflect a stance on religion in another, more indirect, way. Religion, as William James argued, often presents what James described as 'forced options' in which a withholding of decision is itself a decision.²³ Suppose you are camping in the woods and are desperately hungry, though not actually in imminent danger of starvation. One of your camping companions offers you a plateful of freshly picked mushrooms, but another companion says, 'Those mushrooms are poisonous. If you eat them you'll die.' On a purely intellectual level, you may reserve judgment about which of these companions to believe. But you can hardly avoid either eating or not eating the mushrooms. It might be said that while suspending judgment at one level, you nonetheless make a practical or provisional judgment in your behaviour. If you eat the mushrooms, you are acting *as if* the claim that they are poisonous is false. It might be said that

²⁰ Graham Greene, *The Power and the Glory* (Heinemann 1940).

²¹ See Horwitz (n 10) 80 ('The new agnosticism is not a negative or disinterested standpoint with respect to questions of religious truth, but one that is deeply engaged and involved in these questions').

²² In this vein, the take-no-prisoners advocate of atheism, Sam Harris, describes a three-day conference in which various scientists, though atheists themselves (or at least Harris so supposes), suggested that religion might serve useful functions in supporting hope or undergirding values, or that religion and science might not be in conflict with each other. Outraged by this respectful treatment, Harris categorically condemns such irenic views as 'some of the most dishonest religious apologies I have ever heard': Sam Harris, *The Moral Landscape: How Science Can Determine Human Values* (Free Press 2010) 23.

There were several moments during our panel discussions that brought to mind the final scene of *Invasion of the Body Snatchers*: people who looked like scientists, had published as scientists, and would soon be returning to their labs, nevertheless gave voice to the alien bliss of religious obscurantism at the slightest prodding. (ibid 23–24).

²³ The argument was presented in 'The Will to Believe' in William James, *The Will to Believe and Other Essays in Popular Philosophy, and Human Immortality* (Dover edn, Dover Publication 1956) 1, 3, 11, 26–27.

you are *treating* the claim as false. Conversely, if despite your hunger you decline to eat them, you are acting *as if* the claim is true, or *treating* it as true.

In a similar way, James argued, religion often presents us with forced choices in which, although we may wish to suspend judgment intellectually, in our actions we will inevitably treat particular religious propositions as true or else false. If the evangelist says, ‘Accept baptism and be saved; refuse baptism and you will be damned’, you will either accept baptism or you will not accept it; either way, you will be making a practical or working judgment about the truth of the evangelist’s claim. Typically, the term ‘agnosticism’ describes people who, while perhaps uncertain, act as if religious claims were false. David Novak asserts that ‘[d]espite the attempt to create a neutral position called “agnosticism”, one can show that agnostics are actually timid atheists’.²⁴ But an agnostic might go the other way. Anthony Kenny, a philosopher and professed agnostic, maintains that ‘[b]eing agnostic does not mean that one cannot pray. In itself, prayer to a God about whose existence one is doubtful is no more irrational than crying out for help in an emergency without knowing whether there is anyone within earshot’.²⁵

The ‘forced choice’ logic that applies to agnostic individuals extends to governments as well. Religious faiths will make claims on government – claims both as to what government should *do* and what government should *say*. If the religious rationales that support such claims are true, government would be well advised to heed these prescriptions. Conversely, if government attempts to adopt an agnostic stance towards the religious premises and accordingly rejects the prescriptions, then government will in effect be treating the religious claims as false. And government will be conveying the message not that religious beliefs *are* false, perhaps, but that for public purposes these beliefs should be disregarded or treated *as if* they were false.

Thus, of the three versions of secularity that we have identified, none entails that government must be silent with respect to religion. And at least one of the versions (namely, classical secularism) permits or even requires government to affirm some religious propositions.

4.2 MERE SECULARITY?

But a proponent of the common view (namely, that secular governments should not sponsor religious symbols or expressions) may attempt to brush away these complications. What is wanted, he might assert, is not any particular *version* of secularity, but rather *secularity* pure and simple. Much in the way that C S Lewis tried to identify a ‘mere Christianity’ that captured the essence of the faith without taking sides among the various Christian factions and divisions,²⁶ a proponent of secular government might argue that government should simply stick to the secular or ‘not religious’ domain without endorsing or siding with any particular version of secularity, whether classical, comprehensive or agnostic. Just as a secular government is supposed to be ‘neutral’

²⁴ David Novak, ‘Law: Religious or Secular?’ (2000) 86 *Virginia Law Review* 569, 574.

²⁵ Anthony Kenny, *What I Believe* (Continuum International Publishing Group 2006) 64.

²⁶ See CS Lewis, *Mere Christianity* (revised and enlarged edn, Macmillan 1960).

towards religion,²⁷ a *merely* secular government would be neutral as among the various versions of secularism.

But is such a neutral, *merely* secular, position possible? Suppose a government is going on its merrily secular way, doing its secular business, not troubling itself about whether religious claims are knowably true, knowably false, or unknowable; but then people begin to make claims or demands on government involving religion. They want government meetings to begin with prayer,²⁸ or they want government to print ‘In God We Trust’ on the currency.²⁹ Or, from a different perspective, they want government to intervene in churches to eliminate abuse or discrimination.³⁰ How is the government that aspires to be *merely* secular supposed to respond to these demands?

If the government were to deliberate about these demands, form and express judgments regarding the (religious or anti-religious) rationales offered for and against such demands, and then make decisions in accordance with those judgments, government would surely be departing from mere secularity and moving toward some more particular version of secularity. Suppose citizens want to begin government meetings with prayer because, they say, God will then bless the nation;³¹ otherwise God will withhold his blessings and the nation will suffer. If this rationale is correct, then the nation would be well advised to conduct public prayer. But if government accepts the rationale and practises official prayer, it will surely have departed from simple secularity in the direction of something like the classical version. Conversely, if government declines to accept the rationale and prescription, it will in effect have moved towards a more agnostic or perhaps comprehensive version of secularism.

Or suppose government says, ‘We reject the demand for official prayer, but not because we believe the religious rationale supporting the demand is false, or even unknowable. We reject the demand, rather, because it is none of our business – not within our secular jurisdiction – even to consider such rationales or proposals’. In other words, the government rejects the demand for prayer while explicitly declining to endorse comprehensive or even agnostic secularity. Wouldn’t this steadfastly non-committal government have adhered to a position of mere secularism?

²⁷ See generally Andrew Koppelman, *Defending American Religious Neutrality* (Harvard University Press 2013). See also *Lautsi v Italy* (n 2) para 60. For scepticism about such professions of neutrality, see Steven D Smith, ‘The Paralyzing Paradox of Religious Neutrality’ in Kevin Schilbrack (ed), *The Blackwell Companion to Religious Diversity* (forthcoming).

²⁸ See, eg, *Joyner v Forsyth County* 653 F 3d 341 (4th Cir 2011).

²⁹ See, eg, *Newdow v Lefevre* 598 F 3d 638 (9th Cir 2010).

³⁰ See, eg, Laura S Underkuffler, ‘Odious Discrimination and the Religious Exemption Question’ (2011) 32 *Cardozo Law Review* 2069.

³¹ At least in the early years of the American Republic, this view was familiar and respectable. Consider Jefferson’s Second Inaugural Address:

I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life, who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me.

Reprinted in John T Noonan Jr and Edward McGlynn Gaffney Jr, *Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government* (2nd edn, Foundation Press 2001) 206. I am confident that many devout Americans still hold this view.

But then the question arises: *why* would a government adhere to this sort of tenaciously non-committal secularism? It seems clear that not all citizens favour this position. Nor can government plausibly contend that this sort of secularity is ‘neutral’ as among the various religious and secular belief systems and commitments held by citizens; rather, the position quite obviously rejects the religious beliefs of some citizens – beliefs both about prayer and about the proper character of government. The position also rejects the beliefs of citizens who might favour a more aggressively comprehensive version of secularism – the Sam HARRISES of the world.³²

So, what sort of justification might be given in support of this position? The position might be argued for on classical secular premises: government should be merely secular because that is its proper role within the providential scheme. This was, arguably, the position promoted by, among many others, Roger WILLIAMS.³³ But then the merely secular position will have moved towards classical secularity, at least at the level of fundamental justification, and so the ‘merely’ will have faded away. The merely secular position might instead be justified on grounds of comprehensive secularism: government should be merely secular because religious beliefs are wrong-headed or are reducible to secular terms. Or the merely secular position might be defended on more agnostic grounds: government should stick to the domain of the secular because religious claims are irredeemably uncertain and hence best relegated to the private domain. But these defences, again, align the merely secular position with one or another version of secularity, at least at the level of fundamental justification.

And so it seems that the resolution to remain *merely* secular, when challenged, is pushed towards some more particular version of secularism. And this observation holds, it seems, for secular justifications that try to avoid mentioning fundamental philosophical or theological issues at all. Suppose someone contends that government should be merely secular because, given religious diversity, a secular government is better able to maintain civil peace, or is fairer to all of the diversely minded citizens.³⁴ These arguments are eminently contestable, of course, on both empirical and theoretical grounds. What is most pertinent for present purposes, though, is that these arguments already sound in one or another more basic view. Why should civil peace be the dispositive desideratum, while the anticipated blessings of providence – blessings to be poured out on devout political communities – count for little or nothing? It seems that the proponent of this sort of justification has already begun by assuming something like a comprehensive or agnostic secularism.

5. CONCLUSION: WHAT IS TO BE DONE?

The purpose of this article has been a modest one. As against the common view which holds it to be an obvious or even analytic truth that secular governments should refrain from sponsoring

³² See Harris (n 22).

³³ For an insightful exposition, see Timothy L Hall, *Separating Church and State: Roger Williams and Religious Liberty* (University of Illinois Press 1998) 81–86.

³⁴ See generally Rawls (n 9).

religious symbols or expressions, I have tried to argue that the matter is not so simple. Historically, the concept of the 'secular' had religious origins and received its meaning from a religious framework, and the concept in no way entailed that government should not act upon or express religious beliefs. And, although the meaning (or rather meanings) of 'secular' may have changed and diversified, the various conceptions of the 'secular' still do not mandate that government refrain from taking positions for or against beliefs that we classify as 'religious'.

While arguing about what secularity does *not* entail, this article has not attempted to prescribe what government *should* do in the matter of religious symbols and expressions. On the contrary, the apparent implication of our discussion has been that there is no simple or across-the-board answer to that question. In the simplified scenarios that we have considered above, the question would be more tractable. Thus, if everyone, or nearly everyone, in a community were some sort of classical theist, or else some kind of comprehensive secularist, or else stalwartly agnostic, it would be easier to prescribe what government should, or should not, say about religion. But if, as I have suggested, contemporary democratic societies tend to be a mixture of all three views, it is harder to say.

Nor is it my purpose to propose solutions. Still, given the urgency of the problem – it is seemingly at the heart of what in the United States are called the 'culture wars'³⁵ – we might conclude by noticing one obvious but dubious response to the problem, and also one less obvious and inelegant but more promising response. The obvious response is majoritarianism. If most citizens favour legislative prayer or public crosses, then these symbols and expressions will be maintained; if the majority shifts, the practices will change as well. In fact, I think the majoritarian response deserves more respect than it sometimes receives. Still, the majoritarian solution conflicts with the widespread assumption that the purpose of constitutional law or fundamental norms with respect to matters like religion is to protect minorities. And it is a bit unsettling to contemplate that, say, crosses or Ten Commandments monuments will be put up when one party is in power, taken down (and destroyed?) when the other party prevails, and so forth.

The inelegant but more promising approach would take advantage of the fact that law and government are, typically, polycentric and multilevelled. There are different units and levels of government: cities, states or provinces, agencies of various sorts, the national government. And there are different kinds and levels of law: judicial decisions, regulations, local ordinances, statutes, constitutional decisions and provisions. This multiplicity allows for mixed and varied messages: government may affirm religion in one place or on one level while steadfastly refusing to do so in other places or on other levels³⁶ – pluralistic public expression for a pluralistic society, if you like.

Thus, in the United States, all three versions of secularity are arguably affirmed, not just in private but officially, in different places and in different ways. The national motto ('In God We Trust'), printed on every dollar bill, resonates with a classical view. So do the embattled

³⁵ See James Davison Hunter, *Culture Wars: The Struggle to Define America* (Basic Books 1991).

³⁶ This argument is given at much greater length in Steven D Smith, 'Our Agnostic Constitution' (2008) 83 *New York University Law Review* 120.

words ‘under God’ in the Pledge of Allegiance. On the other hand, as I have argued elsewhere, the Constitution itself remains steadfastly agnostic. Unlike the preceding Articles of Confederation and most state constitutions, the national Constitution contains no language that explicitly acknowledges deity. This agnosticism was deliberate. When the Constitution was proposed, critics attacked it for its failure to acknowledge deity, but its supporters stood firm³⁷ and this resolution has withstood subsequent efforts to add religious (or more overtly secular) language to the document.

In the nation’s public schools, the situation is different. In the nineteenth century and the first half of the twentieth century, public schools often practised a so-called ‘non-sectarian’ form of religion in which brief prayers and Bible reading exercises were a regular part of the school day.³⁸ This practice can be seen as an effort to maintain a kind of classical secularity in a religiously pluralistic community. In the latter decades of the twentieth century, under the mandate of the Supreme Court, the schools moved (sometimes haltingly, and grudgingly) to eliminate all religious exercises,³⁹ to teach *about* religion, if at all, only in an ‘objective’ fashion (or, in other words, to study religion as a secular phenomenon), and to teach evolution but not creationism or intelligent design.⁴⁰ While not expressly affirming comprehensive secularism, these changes all resonate with that view; they support comprehensive secularism by omission, so to speak, in much the same way that an American history textbook that never mentioned blacks or women – never said anything about them either favourable or unfavourable – would be likely to be interpreted as supporting white male hegemony. So it is not surprising that the secularity of the schools has provoked frequent objections and litigation from more devout citizens.⁴¹

In short, in the political system of the United States, all three versions of secularity are overtly or obliquely conveyed, in various ways and places. It is not a spectacle calculated to gratify the intellectually fastidious; and one can certainly argue about the quality and proportions of the mix. But, given the diversities of secularity that flourish and the unavailability of any *merely* secular stance, it is perhaps appropriate, or at least necessary, that all of these secularities should have their public manifestation.

This situation might lead us to see the American Supreme Court’s decisions addressing religious symbols in a different and perhaps slightly more charitable light. Officially, since the mid-1980s, the court has said that the Constitution forbids government to endorse religion, but the court has found ways to uphold some religious symbols, including a nativity scene in

³⁷ See, eg, Isaac Kramnick and R Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State* (2nd edn, W W Norton and Company 2005) 27–44.

³⁸ Noah Feldman, *Divided by God: America’s Church-State Problem – And What We Should Do About It* (Farrar, Straus and Giroux 2005) 61–92.

³⁹ See, eg, *School District of Abington Township v Schempp* 374 US 203 (1963); *Engel v Vitale* 370 US 421 (1962). For an examination of this development and its consequences, see Steven D Smith, ‘Constitutional Divide: The Transformative Significance of the School Prayer Decisions’ (2010–11) 38 *Pepperdine Law Review* 945.

⁴⁰ See *Edwards v Aguillard* 482 US 578 (1987).

⁴¹ See, eg, *Mozert v Hawkins County Board of Education* 827 F 2d 1058 (6th Cir 1987).

Pawtucket, Rhode Island,⁴² a menorah display in a Pennsylvania public building,⁴³ a Ten Commandments monument on the Texas state capitol grounds,⁴⁴ and the words ‘under God’ in the Pledge of Allegiance.⁴⁵ The Justices’ explanations for these results have often left readers unpersuaded, or even insulted.⁴⁶

Instead of pretending that such symbols and expressions do not convey any religious message or meaning, the court might have explained that such traditional symbols, although assuredly religious, form an acceptable and even valuable part of the mix of messages that a diversely secular society may predictably and properly produce. Indeed, an aggressive cleansing of the public square of all religious symbols and messages, combined with the agnosticism of the Constitution itself and the more comprehensive secularism of the public schools, might create the justified perception that the nation had embraced a more militant secularism in a comprehensive, or at least agnostic, version. That sort of secularity was never the Supreme Court’s goal;⁴⁷ nor would it fit the pluralistic but pervasively religious character of the American people.

The American court’s shortcoming, in sum, has arguably been not in the results it has reached as much as in its effort to pretend that these results follow from a simple but misguided proposition – namely, that ‘secular’ equals ‘not religious’ equals ‘neutral’. Acknowledging the falsity of that proposition would be a step towards not a pleasing coherence, perhaps, but at least towards greater clarity about what sort of coherence we can and cannot expect.

⁴² *Lynch v Donnelly* 465 US 668 (1984).

⁴³ *County of Allegheny v American Civil Liberties Union* 492 US 573 (1989).

⁴⁴ *Van Orden v Perry* (n 3).

⁴⁵ *Elk Grove Unified School District v Newdow* (n 3).

⁴⁶ Steven Shiffirin comments that ‘I am sure that a pledge identifying the United States as subject to divine authority is asserting the existence and authority of the divine’. He adds that ‘pretending [that this and similar expressions] are not religious is simply insulting’: Steven H Shiffirin, ‘The Pluralistic Foundations of the Religion Clauses’ (2004–05) 90 *Cornell Law Review* 9, 70–71.

⁴⁷ See, eg, *School District of Abington Township v Schempp* (n 39) 306 (Goldberg J concurring):

But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.