

appears on *both* sides of permissive accommodation conflicts.<sup>20</sup> The Establishment Clause protects religious liberty as much as the Free Exercise Clause, and many opponents of aggressively expanded claims for permissive exemptions are, like me, as religiously devout as those who support those claims. It should not be hard to imagine a low- or middle-income parent whose religiously informed understanding of duties owed to existing family precludes additional children—perhaps only for a season, but perhaps forever. If a RFRA exemption from the contraception mandate deprives her of the means to live out that understanding, or forces her to do so at a (dare I say) “material” cost, because of religious accommodations created for her employer who believes differently, that parent has been deprived of *religious* liberty every bit as much as her employer would be without the exemption. Indeed, the exemption amounts to a government preference of her employer’s beliefs to hers.

The increasingly polarized discourse on religious liberty would be immeasurably improved if accommodationists like Professor Brady were to engage the constitutional reality that freedom *from* religion, from the costs of practicing someone else’s religion, is as essential to “religious liberty” as freedom *for* religion. The balance is complicated and hard, but the failure to strike it in one particular place rather than another is hardly evidence that one does not value and even cherish religious liberty.

## RELIGION, CULTURE, AND THE SECULAR IN AMERICA

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I learned tremendously from reading Kathleen Brady’s book about the religion clause in American jurisprudence, and not just because I am not a lawyer. Brady’s patient and careful method throughout the book is truly commendable. As I read this book, I found Brady repeatedly anticipating objections I was on the verge of raising, as if she were already in conversation with the reader. The deliberate thoughtfulness in the progression of her argument, the interweaving threads she explicitly draws between chapters, assisted this reader in following a complex and subtle argument in a field far from her own.

<sup>20</sup> See, for example, Frederick Mark Gedicks, “One Cheer for *Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens,” *Harvard Journal of Law and Gender* 38, no. 1 (2015): 153–76, at 172.

The classic eighteenth-century establishment of religion imposed tax burdens and legal disabilities on non-members that it did not impose on members; among other things, the Establishment Clause was meant to eliminate the practice of making some pay for the religious obligations and observances of others. An important dimension of the Founders’ understanding of religious liberty, therefore, was the freedom to make one’s own choices about religion and religious belief, with whatever costs those entail, without also bearing the costs of religious choices made by others.

*Ibid.*; see also Frederick Mark Gedicks and Andrew Koppelman, “The Costs of the Public Good of Religion Should Be Borne by the Public,” *Vanderbilt Law Review En Banc*, no. 67 (2014): 185–87, at 187.

I would, however, like to raise two cautionary notes. One has to do with a certain optimism I find in this book about American culture's relationship to the term "religion." I find such optimism in Brady's argument in the book's introduction: "We are not all religious, but we can all understand what religion is about and we can appreciate what it is about. We can see the worth of religion or, if not its worth, the worth of protecting it" (6). In a similar vein, Brady later argues "Religious faith is not inscrutable to those without religious commitments. It is also not silly or outdated. It is something rooted in our nature as humans" (93). Finally, in the concluding chapter, we read, "Religious experience has always been a part of human experience and culture, and it always will be" (303). Brady wants to maintain that religion is not especially prone to "absolutism, intolerance, or fanaticism." Indeed, she acknowledges that most religions, in fact, "make room for thought and inquiry, engagement with larger surroundings, and communication with those of other faiths" (65).

The problem with this optimism about the ability to find what we can all agree upon concerning religion is that it is seriously and tragically outdated. Would that this were a world where Schleiermacher's nineteenth-century tame "cultured despisers of religion" still populated secular academe. Instead secular academics now assume that once Hobbes and Locke, Hume and Kant entered the European intellectual bloodstream, the rest of the world would follow suit. For example, political scientist Mark Lilla has argued, "Though we have our own fundamentalists, we find it incomprehensible that theological ideas still stir up messianic passions, leaving societies in ruin. We had assumed this was no longer possible, that human beings had learned to separate religious questions from political ones, that fanaticism was dead. We were wrong."<sup>21</sup>

The terrorist attacks from 9/11 to Paris and San Bernardino, and most recently in Brussels, regularly remind us that Muslims have been conveniently, if problematically, inserted into a now prevailing myth of the creation of Western modernity. Muslim extremists have little interest in the "Great Separation" between politics and religion that Lilla outlined in his 2007 book *The Stillborn God*.<sup>22</sup> The problem with Lilla's and similar accounts lies in their insistence upon equating all religious belief with superstition, irrationality, and ludicrousness. It is in secular liberals' interest to equate religion with terrorism. That is part of the myth itself.

Consider Mark Lilla's argument in *The Stillborn God*, that before the wars of religion in the sixteenth century, humans generally had drawn upon God when reflecting upon political questions. In response to these wars, some European intellectuals moved away from political theology. Lilla tells the story of this "great separation" by which, for children of Hobbes, "a decent political life could not be realized within the terms set by Christian political theology, which bred violent eschatological passions."<sup>23</sup> Religion, on Lilla's view, can "express darker fears and desires," it can "destroy community by dividing its members," and it can "inflame the mind with destructive apocalyptic fantasies of immediate redemption."<sup>24</sup> We in the West are heirs to this fragile separation, but we live among those whose politics are still inflamed by their theology.

In a subsequent article, Lilla wrote that "outside the Islamic world, where theological principles still have authority, there are fewer and fewer objections that persuade people who have no such principles."<sup>25</sup> If drawing upon theological principles to answer political questions leads to

21 Mark Lilla, "The Politics of God," *New York Times*, August 19, 2007, <http://www.nytimes.com/2007/08/19/magazine/19Religion-t.html>.

22 Mark Lilla, *The Stillborn God: Religion, Politics, and the Modern West* (New York: Knopf, 2007).

23 *Ibid.*, 217.

24 *Ibid.*, 260.

25 Mark Lilla, "The Truth about Our Libertarian Age," *New Republic*, June 17, 2014, <https://newrepublic.com/article/118043/our-libertarian-age-dogma-democracy-dogma-decline>.

apocalyptic fantasies, best to keep any theology out of the public square. William Cavanaugh's *The Myth of Religious Violence* shows how this has been a legitimating myth of Western societies, and Michael Buckley's *At the Origins of Modern Atheism* and the sequel *Denying and Disclosing God: The Ambiguous Project of Modern Atheism* argue that it was *exactly* the feckless religion inherited by our founding fathers that turned religion into something at first unnecessary and eventually anti-human.<sup>26</sup> We live, unfortunately, in darker times than Brady's project admits. And this has grave consequences for the defense of religion clause jurisprudence that she wants to bolster.

A second cautionary note concerns Brady's definition of the relationship between the religious and the secular. She maintains that religious and nonreligious commitments are distinct, but believers and nonbelievers are not so different from one another, as "religion belongs to us all" (98). What does she mean by this? It seems to me that Brady draws inspiration from theologian Karl Rahner when she writes that what believers believe explicitly, nonbelievers believe in an implicit and unacknowledged way, as the "ground . . . even if it is unseen and unnamed" (315). For the nonbeliever, "the divine is rarely completely absent, but it is unseen and unacknowledged. It is presumed but not recognized. It is implied, but not knowingly" (311). Secular moral commitments, then, rely unknowingly upon a religious given. The secular person might *think* she is rejecting the divine, but in every moral pursuit, in every attempt at true knowledge, she is implicitly affirming the ground of her existence. There are certainly theological critiques to be made of these claims, but these need not concern us here. In the legal arena of this book, I wonder whether Brady, in asking judges to trust sincere religious people about their ultimate claims, might not also demand that of herself. I doubt a sincere secular person would recognize her description of their unacknowledged beliefs as an accurate description of how he understands himself.

What is ultimately at stake for Brady in this relationship between the secular and religious? She writes, "Secular moral conscience participates in the ultimacy of religious conviction, but not in the same way and not directly. When we appreciate religions' distinctiveness, we see this ultimacy more clearly. By contrast, when we collapse religious and secular convictions, this ultimacy disappears, and when it does, both forms of conscience become more vulnerable to state incursion" (315). This is certainly a problem that vexes modern legal issues concerning religion, but I wonder whether subsuming secular claims to religious ones has the legs Brady needs to maintain the distinctiveness of religion such that it requires protection in the law.

In other words, Brady has put her finger on the problem that faces those of us today who are religiously committed trying to live in a pluralistic democracy that has lost sight of the value of religious identity. As Brady observes, "Conscience was 'sacred' for James Madison and others in the founding era. It had a divine origin and referent, and so did human freedom generally. When this sacredness disappears and human dignity and capacities have no foundation beyond the human itself, human freedom becomes more vulnerable to statist impulses" (316). This is *exactly* the problem, but I am not sure Brady has provided a thick enough solution.

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26 William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (New York: Oxford University Press, 2009); Michael J. Buckley, *At the Origins of Modern Atheism*, rev. ed. (New Haven: Yale University Press, 1990); Michael J. Buckley, *Denying and Disclosing God: The Ambiguous Project of Modern Atheism* (New Haven: Yale University Press, 2004).