

William & Mary Bill of Rights Journal

Volume 18 (2009-2010)
Issue 4 Symposium: Families, Fundamentalism,
& the First Amendment

Article 4

May 2010

God of Our Fathers, Gods for Ourselves: Fundamentalism and Postmodern Belief

Frederick Mark Gedicks

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Repository Citation

Frederick Mark Gedicks, *God of Our Fathers, Gods for Ourselves: Fundamentalism and Postmodern Belief*, 18 Wm. & Mary Bill Rts. J. 901 (2010), <https://scholarship.law.wm.edu/wmborj/vol18/iss4/4>

Copyright c 2010 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

GOD OF OUR FATHERS, GODS FOR OURSELVES: FUNDAMENTALISM AND POSTMODERN BELIEF

Frederick Mark Gedicks*

INTRODUCTION: BUT WHICH ONE?	901
I. THE DEMISE OF METANARRATIVE	902
II. THE RISE OF SPIRITUALITY	905
III. THE PERSISTENCE OF FUNDAMENTALISM	907
IV. THE ADAPTATION OF DOCTRINE: A FUNDAMENTALIST TURN?	909
<i>A. Free Exercise Decisions</i>	909
<i>B. Anti-Establishment Decisions</i>	911
CONCLUSION: BUT WHICH ONE?	912

INTRODUCTION: BUT WHICH ONE?

God is back.

—John Micklethwait & Adrian Wooldridge (2009)¹

Western culture has been obsessed with the “death of God” at least since Nietzsche.² During the 1900s, this took the form of a prediction—mostly by intellectual elites—that modernization had so preempted belief that the latter would eventually disappear entirely.³ That prediction turned out to be spectacularly wrong

* Guy Anderson Chair & Professor of Law, Brigham Young University Law School; gedicksf@law.byu.edu.

I am grateful for comments and criticisms from my friend and periodic co-author Roger Hendrix, from my colleagues at a BYU law faculty colloquium discussing an earlier draft of this Essay, and from participants at the Bill of Rights Journal symposium. Will Hains and Allison Shiozawa Miles provided excellent research assistance, and BYU Research Librarian Galen Fletcher was (as always) indispensable in identifying and finding difficult sources.

This Essay revisits and extends themes that I discussed in my 2004 Annual Lecture for the Center for Church/State Studies at DePaul University. See Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197 (2005).

¹ JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *GOD IS BACK: HOW THE GLOBAL REVIVAL OF FAITH IS CHANGING THE WORLD* 27 (2009).

² See FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* § 108, at 167, § 125, at 181 (Walter Kaufmann trans., Random House 1974) (2d ed. 1887).

³ William H. Swatos, Jr. & Kevin J. Christiano, *Secularization Theory: The Course of a Concept*, 60 SOC. RELIGION 209, 214 (1999); R. Stephen Warner, *Work in Progress Toward*

in the United States,⁴ if not elsewhere,⁵ so here the obsession has lately shown itself as denial: God is not only not dead, he's not even sick. Popular and academic literature is now filled with triumphant—and regretful—expositions of the contemporary vibrance and vitality of religion.⁶ God has cheated death (or, at least, Nietzsche).

Or has he? There is the God whose death was widely predicted, and there is the God who today is alive and well, but they're not the same God. The God who died is the God of Christendom, who bound together Western society with a universal account of the world that did not survive the advent of postmodernism; this God, indeed, is dead.⁷ The God who remains alive is the one adapted to postmodernism; the vitality of that God is on display in contemporary American religion, especially in the spirituality movement.⁸ The most pressing religious problem now confronting the world is posed by believers who refuse to recognize the postmodern condition that has brought about the demise of the first God and the rise of the second; I will refer to such believers as “fundamentalists.”⁹ All three of these phenomena—the death of God, his rebirth in postmodernity, and his remnants in fundamentalism—are manifest in recent religion clause decisions, though there are also recent suggestions that the Court may be poised to take a fundamentalist turn.¹⁰ I will close with a suggestion linked to that most traditional of believing virtues, humility.¹¹

I. THE DEMISE OF METANARRATIVE

God is dead.

—Friedrich Nietzsche (1882)¹²

a New Paradigm for the Sociological Study of Religion in the United States, 98 AM. J. SOC. 1044, 1046–47 (1993).

⁴ See, e.g., Peter L. Berger, *Secularization Falsified*, FIRST THINGS, Feb. 2008, at 23, 23–24, available at <http://firstthings.com/article/2008/01/002-secularization-falsified-1>.

⁵ Compare Alan Wolfe, *And the Winner Is . . .*, ATLANTIC, Mar. 2008, at 56, 58–60 (arguing that the United States is an outlier and that the “most basic tenet” of secularization—“that material progress will slowly erode religious fervor”—remains “unassailable,” and discussing data on worldwide religious belief and practice generated by the Pew Global Attitudes Project), with PETER BERGER ET AL., RELIGIOUS AMERICA, SECULAR EUROPE?: A THEME AND VARIATIONS 9–10 (2008) (arguing that Western Europe is the outlier, and that the secularization hypothesis has proved false everywhere else in the world).

⁶ For triumph, see, e.g., BERGER ET AL., *supra* note 5; MICKLETHWAIT & WOOLDRIDGE, *supra* note 1. For regret, see, e.g., RICHARD DAWKINS, THE GOD DELUSION (2006); SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON (2004); CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007).

⁷ See *infra* Part I.

⁸ See *infra* Part II.

⁹ See *infra* Part III.

¹⁰ See *infra* Part IV.

¹¹ See *infra* Conclusion.

¹² NIETZSCHE, *supra* note 2, § 125, at 181.

Reports of God's death have been greatly exaggerated in the United States, and probably everywhere else except Western Europe. To be sure, the number of self-declared unbelievers in the United States has dramatically risen in the last half century, from about three percent of the population in the 1950s to between eleven and sixteen percent now, but still remains low relative to the number of believers.¹³ Much of the reported increase in unbelief, moreover, might be attributed to a mistake in statistical analysis: For years, those who declined to state a religious affiliation were categorized as unbelievers, whereas it now appears that many of these folks actually believe in "God or some higher power."¹⁴ Indeed, some data suggest that as many as twenty-one percent of self-identified *atheists* actually believe in "God or a universal spirit,"¹⁵ which means that many unbelievers are more confused than unbelieving.

So was Nietzsche wrong? Some philosophers—notably Martin Heidegger—maintain that the "death of God" is a metaphor signifying the end of metaphysics.¹⁶

¹³ See, e.g., BAYLOR INST. FOR STUDIES OF RELIGION & DEP'T OF SOCIOLOGY, BAYLOR UNIV., AMERICAN PIETY IN THE 21ST CENTURY 11 (2006) [hereinafter BAYLOR STUDY] (reporting that 89.3% of Americans identify themselves as members of a religion, compared to 10.8% who self-identify as unaffiliated with any religious tradition), available at <http://www.baylor.edu/content/services/document.php/33304.pdf>; see also BARRY A. KOSMIN ET AL., GRADUATE CTR. OF THE CITY UNIV. OF N.Y., AMERICAN RELIGIOUS IDENTIFICATION SURVEY 12–13 (2001) (reporting 80.2% and 14.1%, respectively), available at http://www.gc.cuny.edu/faculty/research_briefs/aris/key_findings.htm; THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 20 (2008) [hereinafter PEW STUDY] (reporting 83.1% and 16.1%, respectively), available at <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>.

¹⁴ See BAYLOR STUDY, *supra* note 13, at 12 (reporting that 62.9% of those self-identifying as religiously unaffiliated believe in "God or some higher power"); PEW STUDY, *supra* note 13, at 5 (reporting approximately thirty-six percent with respect to same group).

¹⁵ See PEW STUDY, *supra* note 13, at 8.

¹⁶ See WILLIAM J. RICHARDSON, HEIDEGGER: THROUGH PHENOMENOLOGY TO THOUGHT 361–62 (3d ed. 1974).

"God" for Nietzsche . . . symbolizes the "world," the order, of metaphysics. To say that God is dead is to say that this metaphysical world has lost its vitality, has lost all power to offer man something to which he can hold fast or by which he can find his bearings, has come to mean nothing at all. . . . Nietzsche's word, "God is dead," according to Heidegger, is but a simple declaration of fact, it describes in a striking formula the metaphysical nihilism to which Nietzsche is witness.

Id. (footnotes, paragraph indentation, and Latinisms deleted); accord GIANNI VATTIMO, AFTER CHRISTIANITY 3 (Luca D'Isanto trans., 2002).

"God is dead" means nothing else than the fact that there is no ultimate foundation. An analogous meaning . . . is found in Heidegger's polemics against metaphysics—the whole European philosophical tradition from Parmenides on—which believes itself capable of grasping the ultimate foundation of reality in the form of an objective structure like an essence or a mathematical truth, which is given outside of time.

Id.

The “death of God” is the demise of “metanarratives,” to use Lyotard’s term¹⁷—that is, “general accounts of human nature and history that purport to be independent of time, place, culture, and other contextual influences, and that determine how knowledge and truth are constituted.”¹⁸ Metanarratives purport “to grasp the true structure of reality, the laws of history, and the method for acquiring knowledge about the only ‘truth.’”¹⁹ “God is dead,” then, does not mean that there is no God, but rather that there is no metaphysical or other foundation that enables humankind to demonstrate objectively the essential character of the world. The death of God marked the birth of postmodern life—that is, life without hope for certain and demonstrable knowledge about how or what the world really is.

Like the death of God, postmodernity is an understanding of the world both powerful and misunderstood. People often talk about it as if it were a kind of ideological fraternity. “Ah,” they’ll say, “you only think there’s no objectivity because you’re a ‘postmodernist,’” just like they might say, “you only like Palin because you’re a conservative,” or “you only hate the Yankees because you’re a Red Sox fan,” as if postmodernism were a matter of affiliation or commitment. But postmodernism is not an ideology to which one is persuaded or a fan club that one joins; as Lyotard argued, it is a *condition*—like gravity or the weather.²⁰ That we don’t go spinning off into space, or that it rains and snows, are not matters that one “chooses” or “commits” to believe (or not), but rather given conditions under which we live. Likewise with postmodernity: it is life without demonstrable knowledge about what life is.²¹

Postmodernity and the death of God are an insightful (if provocative) account of our current condition in the West. Like gravity and the weather, their evidence is all around us. Our age is marked by radical dissensus about the meaning of life, the reality of the world, and virtually everything else that matters. Neither Enlightenment, nor Romanticism, nor Marxism, nor Capitalism, nor Science, nor Reason, nor anything else has provided a complete and uncontroversial explanation of the world that reveals its truth and reality.²² Nor has religion served us any better: Whether God exists, who or what God is, what life means (or doesn’t) as a consequence of this (non)existence, what demands God makes on humankind, whether and how one can reliably discover and understand these demands, to what extent those demands should

¹⁷ JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* xxiv (Geoff Bennington & Brian Massumi trans., 1984) (1979) (defining “postmodernism” as “incredulity toward metanarratives”).

¹⁸ Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 *DEPAUL L. REV.* 1197, 1198–99 (2005) (citation omitted).

¹⁹ VATTIMO, *supra* note 16, at 86.

²⁰ LYOTARD, *supra* note 17, at xxiii.

²¹ See Ashley Woodward, *Nihilism and the Postmodern in Vattimo’s Nietzsche*, 6 *MINERVA: AN INTERNET J. PHIL.* 51, 57 (2002), <http://www.ul.ie/~philos/> (“Postmodernity is generally thought to be characterized by the fragmentation of society into multiple, incommensurable forms of life,” none of which “can explain social reality as a whole.”).

²² See Gedicks, *supra* note 18, at 1204–06.

be enacted or reflected in secular law, whether law can or should even be secular (or religious)—there is no consensus account of such matters in the United States or the world, and the possibility of one is well beyond our grasp.²³

Of course, the end of metanarratives is not the end of *belief* in metanarratives, any more than the death of God ended belief in God. Plenty of people still believe in a God who guarantees the ultimate meaning of the universe and arbitrates the truth or falsity, good or evil, and right or wrong of every action in it—they just believe in different versions of this God,²⁴ which nicely demonstrates the point: The problem is not, “There is no God,” but rather, “There are too many Gods,” innumerable versions, so many that it is impossible to demonstrate which is the true one, except to those who already believe in it. This brings us back to God’s death as a metaphor for the end of metanarratives: the one God, the God at the foundation of the world, the God of the God’s-eye view of the world as it really is, the God that stands astride the void and generates the metaphysical order that keeps it from collapsing into chaos—this God, indeed, has died.

II. THE RISE OF SPIRITUALITY

Is God Dead?

—*Time Magazine* (1966)²⁵

How does belief function, how does it “work,” in a postmodern world in which the one God has died? One response has been to refocus the object of belief, from a transcendent God to an immanent one.²⁶ If there are too many Gods, and no inter-subjective way of demonstrating which of them is cosmically the true one, one rational response is simply to choose the one who serves your needs the best, the one who “fits”—your lifestyle, your preferences, your situation, your beliefs about the world. It’s like trying on shoes—you just keep at it until you find the pair that looks and feels good. In this way of thinking, if one cannot persuasively describe the one God of everyone, at least each person might identify the God who works for him or her.

This postmodern style of belief, sometimes called “spirituality,” is all about personal choice, treating religion as a taste or preference like any other consumer good.²⁷ There’s no truth or falsity here, no right or wrong other than what works for the

²³ See Frederick Mark Gedicks, *Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason*, 61 ALA. L. REV. 337, 349–51 (2010) (discussing the multiplicity, indeterminacy, individuation, and ubiquity of contemporary American belief).

²⁴ Gedicks, *supra* note 18, at 1216–17.

²⁵ Cover Art, TIME, Apr. 8, 1966.

²⁶ See Gedicks, *supra* note 18, at 1219 (noting that “[f]or spiritually inclined Americans, religion is about revelation of the immanent, rather than the transcendent”).

²⁷ *Id.* at 1216–17.

believer, anymore than there's a right or wrong about the best flavor of ice cream.²⁸ (But if you're wondering . . . Ben & Jerry's Vanilla Heath Bar Crunch.) Spirituality counsels adherence to a faith or religion based on the individual needs it satisfies, rather than the truth-claims it makes or the conversion experience it may generate.²⁹ It incorporates the consumer mentality of the market; believers shop for beliefs and practices, picking and choosing from among diverse and even incompatible denominations and traditions.³⁰ Whereas the principal focus of traditional religion is its revelation of a reality beyond the temporal self, the emphasis of spirituality is on revelation of that very self.³¹ Thirty percent of Americans identify themselves as “[s]piritual, but not religious.”³²

Postmodern sensibilities have also eroded traditional understandings of God and belief in denominational Christianity, even among members of some historically conservative denominations.³³ Large numbers of teenage evangelicals, for example, do not believe in the resurrection and reject the idea of absolute truth, believing that “all religious faiths teach equally valid truths.”³⁴ Many members of the more theologically liberal Protestant mainline—American Baptists, Congregationalists, Episcopalians, Lutherans, Methodists, and Presbyterians—are skeptical about the divinity of Jesus,

²⁸ For a detailed discussion of postmodern spirituality, see *id.* at 1215–19.

²⁹ *Id.* at 1218.

³⁰ See, e.g., Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and its Importance to the Law*, 51 BUFF. L. REV. 127 (2003); see also Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37, 57 (2000) (arguing that “[d]enominational categories are no longer sufficient or primary religious identifiers for many contemporary Americans”).

³¹ See Gedicks, *supra* note 18, at 1219; see also ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION: HOW WE ACTUALLY LIVE OUR FAITH* 182–84 (2003); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 67 (2002).

At the time of the Framing, religion, for many Americans, was a source of comprehensive understanding about Divine Providence and the order of the universe. The rise of science, technology, psychoanalysis, and other profoundly secularizing influences, however, has altered perceptions about the role of religion. For many Americans, religion is now affective, psychological, and interior.

Id.

³² See, e.g., Poll: *A Post-Christian Nation?*, NEWSWEEK, Apr. 3, 2009, at 11 (emphasis added), available at www.newsweek.com/id/192311.

³³ See, e.g., Gedicks, *supra* note 18, at 1216; Charles Trueheart, *Welcome to the Next Church*, ATLANTIC, Aug. 1996, at 37 (describing the evangelical megachurch movement).

³⁴ See Dale Buss, *Christian Teens? Not Very*, WALL ST. J., July 9, 2004, at W13 (reporting findings of evangelical youth minister Josh McDowell that ninety-one percent of born-again teenage evangelicals do not believe in absolute truth, that a “slight majority” reject the resurrection, and that nearly sixty percent believe that “all religious faiths teach equally valid truths”).

the Trinity, the literality or historicity of the Bible, and Jesus's miracles, including the resurrection.³⁵

The current market for belief is focused on meeting the needs of individuals, as individuals themselves define those needs. Hence the rise of the "therapeutic God," the God of self-affirmation, the friendly and accepting and loving God who is so different from the wrathful God of uncompromising (because absolute) truth. Immanence has replaced transcendence as the focus of the search for God. Rather than a search for the truth, religion has turned into a search for self. We have replaced the God of our fathers with Gods for ourselves.

III. THE PERSISTENCE OF FUNDAMENTALISM

God is not dead.

—Henry Wadsworth Longfellow (1864)³⁶

Another response to postmodernity is fundamentalist withdrawal. Withdrawal is motivated by an unwillingness to make the compromises to one's belief that God is not dead that are necessitated by a postmodern society.³⁷ Amish, polygamist Mormon, and ultra-orthodox Jewish communities are examples of withdrawal, and illustrate as well that it is not a common response to postmodernity.

More common is the response of another kind of believer, who likewise rejects the death of God and the limits of the postmodern condition, but declines to retreat in the face of its challenges. These believers affirm the God of our fathers, the God who is (still) actively involved in the fight between truth and falsity, good and evil, right and wrong.³⁸ They consequently affirm that one's job as a believer in this God is to fight that fight with him, by enacting his truths into law and aligning the government with them.³⁹ These, too, are fundamentalists, those who not only maintain that they have the only truth—an unremarkable claim that many religions make, including my own—but that they know this truth and the God that guarantees it with such reliability and confidence that they are impelled to structure society around it.⁴⁰

³⁵ Walter Russell Mead, *God's Country?*, FOREIGN AFF., Sept.–Oct. 2006, at 24, 30; see also *id.* at 31 (describing the Protestant mainline as having a "lower estimate of the difference between Christians and non-Christians than do the other major forms of American Protestantism," and attaching little importance to the "idea of the church as a supernatural society whose members enjoy special grace").

³⁶ HENRY WADSWORTH LONGFELLOW, *Christmas Bells* (1864), reprinted in THE COMPLETE POETICAL WORKS OF HENRY WADSWORTH LONGFELLOW 319 (1899).

³⁷ See Gedicks, *supra* note 18, at 1219–20.

³⁸ *Id.* at 1223–24.

³⁹ *Id.* at 1220–21.

⁴⁰ *Id.* at 1220–22.

I am, of course, using “fundamentalist” in a broader and less historical way than it is traditionally used in American religious history. The term originated in the reaction of Protestant evangelicals to the secularization and permissiveness of the American 1920s.⁴¹ A “fundamentalist” in those days signified one who was ready to fight these trends by returning to the “fundamentals” of evangelical Protestantism.⁴² This original American fundamentalism was characterized by militant resistance to modernism, deep commitment to Biblical literalism and an exceptionalist conception of truth, and nostalgia for a mythic era in which Protestant faith and morality were widely shared among the populace and reinforced by government.⁴³

American fundamentalism is now only one manifestation of a global fundamentalist movement that seeks to overturn secular society and to refill the ensuing vacuum with a revitalized public religion.⁴⁴ This global sense of “fundamentalist” is attitudinal, even philosophical. Contemporary global fundamentalists mirror the historical American fundamentalists, as literalists who subordinate their individual interests to the absolute authority of a larger spiritual community that is believed to embody the one true religion,⁴⁵ and as believers in their God, texts, doctrines, and other authorities as “absolute, plain, and unchangeable” guarantors of truth.⁴⁶ Contemporary global fundamentalism is “the affirmation of religious authority as holistic and absolute, admitting of neither criticism nor reduction,” combined with “the collective demand that specific creedal and ethical dictates derived from scripture be publicly recognized and legally enforced.”⁴⁷

As with everything, there is a range of fundamentalisms, from Islamists who believe in the alignment of government with Shari’a law and the suppression of religious dissent, to conservative American Christians who espouse classic tolerance—that government should align itself with the true religion, but need not suppress dissent or coerce religious belief or exercise.⁴⁸

In the United States, fundamentalism increasingly travels in the guise of civil religion, a purportedly inclusive, trans-religious version of belief that is actually quite

⁴¹ GILLES KEPEL, *THE REVENGE OF GOD: THE RESURGENCE OF ISLAM, CHRISTIANITY AND JUDAISM IN THE MODERN WORLD* 105 (Alan Braley trans., 1994); GEORGE M. MARSDEN, *UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM* 50–56 (1991).

⁴² KAREN ARMSTRONG, *THE BATTLE FOR GOD* 171–72 (2000); BRUCE B. LAWRENCE, *DEFENDERS OF GOD: THE FUNDAMENTALIST REVOLT AGAINST THE MODERN AGE* 168–69 (1989); MARSDEN, *supra* note 41, at 57.

⁴³ ARMSTRONG, *supra* note 42, at 172, 174; KEPEL, *supra* note 41, at 105–06; MARSDEN, *supra* note 41, at 66–67.

⁴⁴ LAWRENCE, *supra* note 42, at 3.

⁴⁵ *See id.* at 5–6, 108–09.

⁴⁶ Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1, 14 (1993).

⁴⁷ LAWRENCE, *supra* note 42, at 27.

⁴⁸ *Compare id.* at 121, *with id.* at 230.

the sectarian opposite. American civil religion projects deep sectarian meaning that excludes religious minorities and even many Christians.⁴⁹ One of the signal accomplishments of the United States has been the slow but steady creation of religiously equal citizenship as a social and constitutional norm.⁵⁰ That norm is now under attack by those who insist that the United States is a Christian nation that merely tolerates non-Christians and others who do not conform to their theologically conservative views.⁵¹

IV. THE ADAPTATION OF DOCTRINE: A FUNDAMENTALIST TURN?

Speak, God.

—Roberto Mangabeira Unger (1975)⁵²

A. *Free Exercise Decisions*

I have argued elsewhere that contemporary free exercise doctrine was a predictable response to the death of God and the postmodern demise of metanarratives.⁵³ Protecting religious exercise as a constitutionally distinct activity requires the construction and maintenance of boundaries between religion and other activities that are not presumptively entitled to special protection against government burdens. In postmodernity, however, religion has no privileged understanding of the good, and thus no claim to special protection from the burdens of government to which all citizens are normally subject.⁵⁴ This notion is crudely captured in the half-serious observation that it is unfair to give Christian believers Sunday off to go to church when NFL fans don't get Sunday off to go to watch their favorite team, which is *their* religion. A more precise way of putting this point is that there is no obvious difference between the desire of Christians to worship on Sunday, and any number of morally serious secular activities, such as spending time with one's family, engaging in social or political activism, or volunteering one's time to charitable, community, or other worthy causes. An easy way to evade this boundary maintenance problem is not to draw the boundary in the first place, which is precisely the state of current constitutional

⁴⁹ See Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 292–99 (2007) (arguing that “[d]uring recent decades, conservative Christians have successfully projected potent theological meaning” onto traditionally Judeo-Christian symbols and practices such that “Judeo-Christianity has become . . . ‘sectarianized’”).

⁵⁰ *Id.* at 302–03.

⁵¹ *Id.* at 302.

⁵² ROBERTO MANGABEIRA UNGER, *KNOWLEDGE & POLITICS* 295 (1975).

⁵³ See Gedicks, *supra* note 18, at 1226–29.

⁵⁴ See *supra* Part II.

doctrine: believers are not presumptively entitled to protection from incidental burdens imposed on their beliefs and practices by generally applicable and religiously neutral government action.⁵⁵

This argument, however, did not take account of the fact that religious exercise retains the privilege of special protection under a variety of federal and state statutes. Under the Religious Freedom Restoration Act (RFRA), federal government action that substantially burdens the free exercise of religion must satisfy the “compelling interest” standard, even when the action is generally applicable and religiously neutral: such burdens must be justified by a compelling governmental interest that cannot be implemented in any less restrictive manner.⁵⁶ Similarly, the Religious Land Use and Institutionalized Persons Act (RLUIPA) requires that state government action that burdens the religious exercise of believers held in state custody, and state land use regulations that burden the construction and operation of places of worship and other religious uses of property, are also subject to the compelling interest standard.⁵⁷ Finally, about half of the states apply the compelling interest standard, or something close to it, to incidental burdens on religion—again, even when such burdens are religiously neutral and generally applicable.⁵⁸

The Supreme Court has taken care to interpret these statutes to protect the interests of small or unpopular minority religious.⁵⁹ Still, the special statutory protection for religion requires maintenance of a boundary between religious exercise and all other activities, a difficult task about which the Court has expressed little concern.⁶⁰

⁵⁵ See *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (noting that Supreme Court cases “establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice”); *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877–80 (1990) (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” (citation omitted)).

⁵⁶ See 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

⁵⁷ See 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

⁵⁸ See 1 WILLIAM W. BASSETT ET AL., *RELIGIOUS ORGANIZATIONS AND THE LAW* §§ 2:57–2:58 (1997 & Supp. 2009) (collecting citations to state statutes and court cases mandating application of the pre-*Smith* compelling interest test to state laws that incidentally burden religious activity).

⁵⁹ See *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423–25 (2006) (upholding RFRA claim by a 137-member Brazilian sect to use sacramental tea containing Schedule I controlled substances); *Cutter v. Wilkinson*, 544 U.S. 709, 712–13 (2005) (rejecting facial challenge to RLUIPA in litigation of claims of Satanist, Wiccan, Asatru, and Church of Jesus Christ Christian prisoners).

⁶⁰ See *Cutter*, 544 U.S. at 724–26 (holding that affording special protection to religious but not comparable secular activities does not violate Establishment Clause).

B. Anti-Establishment Decisions

I have also argued elsewhere that Establishment Clause doctrine manifests post-modernity and the death of God in its articulation of the Clause's core meaning—namely, its prohibition on government support of any national or state religion.⁶¹ They are also evident in more contested doctrines, such as the prohibition on exercise of government authority by religious groups,⁶² the nonjusticiability of theological questions,⁶³ the requirement that religious entities may receive government funding only if such receipt is incidental to the administration of secular eligibility criteria and the result of individual rather than government choices,⁶⁴ and the requirement of government neutrality between different religions and between belief and unbelief.⁶⁵

These decisions do not merely signify that it is wrong or ill-advised for the government to endorse the truth of a particular religion (although doubtless it is), but that it is impossible even in principle for government to make such a determination. The implausibility of government's determining which religion is the true one is confirmed by recent decisions.

For example, when the Court recently upheld a state monument of the Ten Commandments installed in the 1950s, it held that the historical significance of the Commandments, together with secular monuments in the immediate vicinity, balanced or even cancelled their contemporary religious significance.⁶⁶ By contrast, the Court

⁶¹ See Gedicks, *supra* note 18, at 1229–32.

⁶² See, e.g., *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (holding that the funding of a school district designed to coincide with the neighborhood boundaries of a religious group is an unconstitutional aid to religion); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (finding an Establishment Clause violation where a state's blue law allowed religious institutions within 500 feet of a liquor-license applicant to veto issuance of the license).

⁶³ See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (finding that a state supreme court's determination that a church's removal of a bishop was "arbitrary" was improper judicial interference in an internal church dispute); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952) (striking down a state law transferring a church from Russian to American control, on grounds that it improperly involved the state with an internal church dispute, in violation of the parishioners' free exercise rights).

⁶⁴ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding Ohio's school voucher plan); *Mitchell v. Helms*, 530 U.S. 793 (2000) (rejecting challenge to Louisiana program by which educational materials were provided to religiously-affiliated schools).

⁶⁵ See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (finding that state law criminalizing teaching of evolution was not religiously neutral because state made no attempt to remove all discussion of the origins of man from the curricula of its schools—only that which apparently conflicted with the biblical creation stories).

⁶⁶ *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (four-Justice plurality opinion by Rehnquist, C.J.) (concluding that because the state had "treated its Capitol grounds monuments as representing the several strands in the State's political and legal history," the monument of the Commandments had "a dual significance, partaking of both religion and government"); *id.* at 701–02 (Breyer, J., concurring in the judgment) (concluding that the place of the Commandments monument in a "large park containing 17 monuments and 21 historical

has invalidated recently erected local government displays of the Commandments, concluding that the context of their approval and construction bespoke a government purpose to endorse a particular understanding of the Judeo-Christian tradition in the United States, making the display violation of the Establishment Clause for lack of a secular purpose.⁶⁷ Indeed, the Court's only recent departure from government neutrality with respect to religion permitted discrimination *against* religion.⁶⁸

Postmodern sensibilities are clearly at work in the endorsement test that has dominated Establishment Clause jurisprudence for a generation. "Endorsement" is all about individual feeling and perception.⁶⁹ In Justice O'Connor's classic formulation, the test prohibits all government action that would cause a "reasonable observer" to *feel* like a favored insider or a disfavored outsider.⁷⁰

Here, too, the Court may be poised to turn back towards fundamentalism. With Justice O'Connor's retirement, the ideological center of the Court on Establishment Clause questions is Justice Kennedy, who has long believed that the proper touchstone for Establishment Clause analysis is the government's coercion of religious exercise, not its mere endorsement of religious belief.⁷¹ Under a coercion analysis, government endorsement of even sectarian religious beliefs would not trigger an Establishment Clause violation if unaccompanied by penalties imposed on religious belief or exercise.⁷² Indeed, in a recent opinion joined by Justice Kennedy and two other Justices, Justice Scalia declared that American government may expressly endorse monotheism, despite its necessary exclusion of unbelievers and deistic, polytheistic and nontheistic believers.⁷³

CONCLUSION: BUT WHICH ONE?

Only a god can save us.

—Martin Heidegger (1966)⁷⁴

markers" communicated a secular ethical and moral "message[] about proper standards of social conduct[]"; *see also* Pleasant Grove City v. Sumnum, 129 S. Ct. 1125, 1140 (2009) (Scalia, J., concurring) (discussing how a city monument of the Ten Commandments was sufficiently historical that it did not violate Establishment Clause).

⁶⁷ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 868–70 (2005).

⁶⁸ *Locke v. Davey*, 540 U.S. 712 (2004) (singling out students majoring in ministerial or pastoral studies for exclusion from state-funded scholarship program).

⁶⁹ *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

⁷⁰ *Id.* ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

⁷¹ *See Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. ACLU*, 492 U.S. 573, 655–79 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁷² *See, e.g., Lee*, 505 U.S. at 631–46 (Scalia, J., dissenting).

⁷³ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

⁷⁴ "Only a God Can Save Us": Der Spiegel's Interview with Martin Heidegger (Maria P. Alter & John D. Caputo trans.), 20 PHIL. TODAY 267, 277 (1976), reprinted in THE HEIDEGGER

The death of God signifies the end of all metanarratives, the secular as well as the religious. So Enlightenment dismissals of belief as “unscientific” or “irrational,” and thus unworthy of consideration by intelligent persons,⁷⁵ are as dead as the God of our fathers. In a postmodern world, there is no basis for preferring the metaphysics of science or reason or any secular philosophy or morality over the metaphysics of religious belief.⁷⁶ God has as much right to be in politics, or education, or government as do Darwin and Kant.

Except that this God is dead—that is to say, the God of our fathers is dead. The possibility of a universally applicable and universally accepted narrative that definitively explains the world and defines its truth and reality is no longer a live one. The God that can be in public life is the God—or rather, the Gods—of ourselves, the consumerist, therapeutic Gods of spirituality, the Gods who cannot impose a transcendent universal truth because they are the purveyors of a different immanent truth for each believer. The religion that Enlightenment exiled to the margins of public life is not the religion that can return to public life, even after the discrediting of Enlightenment.⁷⁷ Neither the religion nor the secular philosophy that makes cosmic claims about absolute and universally applicable truth can fit in a world in which the notion of such a truth is no longer plausible to those who do not already believe it.

How should a believer live in such a world? *Carefully*, I would say. As its Latin root suggests, “religion” is conscientiousness; to live religiously is to live scrupulously, conscientiously, *carefully*.⁷⁸ Such care is underwritten by both pragmatic and ethical considerations.

For pragmatic reasons, believers—and especially minority believers—in a pluralist society ought to be wary of conflicts framed in terms of absolute truth; such conflicts are zero-sum games that yield the fruits of victory to only a single winner. In a pluralist society, one can never be sure of emerging (and remaining) the winner of political or other public contests framed in terms of absolute truth. Risk-averse believers will conclude that working for a portion of social space to practice their religion authentically, rather seeking to control all of that society, is the safer strategy. Of course, not all believers are risk averse, especially contemporary fundamentalists.

But there is also an ethical reason for wariness. One should pause at imposing absolute truth on those to whom the validity of that truth cannot be demonstrated unless they already believe it—indeed, absolute truth whose universality or validity

CONTROVERSY: A CRITICAL READER 91, 107 (Richard Wolin ed., 1993) (English translation of interview with Heidegger conducted Sept. 23, 1966, and published in *DER SPIEGEL*, May 31, 1976, at 193, a few days after his death).

⁷⁵ See Gedicks, *supra* note 18, at 1206.

⁷⁶ See *id.*

⁷⁷ See *id.* at 1207–08.

⁷⁸ See JOHN C. TRaupMAN, *THE NEW COLLEGE LATIN & ENGLISH DICTIONARY* 265 (1966) (entries for “religio” and “religiose”).

may sometimes be in question even among those who claim to believe it. As Learned Hand once famously declared, “The spirit of liberty is the spirit that is not too sure that it is right.”⁷⁹ This is the best safeguard of religious freedom in a pluralist democracy, a constant and present and humble reticence at imposing one’s own truth as the truth for all.

⁷⁹ GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 549 (1994) (quoting from Hand’s famous speech in Central Park on “I Am an American Day” on May 21, 1944). The relevant passage reads:

The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

Id.