Defining Religion and Secularity for a Post-Secular Understanding of Religious Liberty

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Vigorous debate now centers on what it means for the state and the law to be "secular" or even whether secular neutrality is possible. Critical perspectives on law have put into question the professed neutrality and universality of law, but discussion of the "secular" and secularism focus mainly on redefining those terms without considering the historical connection between law and religion, without defining religion, and without reexamining the nature of law and human rights. In other words, even with these widespread debates, contemporary conceptions of law and human rights remain essentially untouched and intact. These conceptions continue to view religion primarily from the perspective of law (e.g., rights protecting religious liberty) and presuppose that the law is predominantly secular rather than religious. On this account, religion can be contained within the private realm of faith while law circulates freely in the public realm of reason.

In an attempt to demonstrate the possibility of religious freedom, I will challenge the prevailing view that the law can be presumed to be "secular" and argue for a post-secular understanding of religious freedom. I anticipate that the article will be divided into three sections. The first section will focus on the burgeoning literature on secularism, secularization, and secularity and on attempts by religion scholars to modify predominant understandings of religion to be more inclusive of the breadth of religious diversity. The second section will use U.S. Supreme Court cases to demonstrate how free exercise claims under the First Amendment involve competing classifications of what is secular and what is religious that problematize the idea that the law can be neutral with respect to religion. Finally, the last section will argue that the possibility of religious liberty in a post-secular society requires vigilant awareness of the ongoing disagreements about classifications of what is religious and what is secular and an understanding of religious liberty as aiming at both minimizing the dominance of any particular classification and maximizing the coexistence of divergent classifications.

With respect to the first section, I will argue that the scholarly attention on the empirical and normative dimensions of secularization, secularity, and secularism has proceeded to define the "secular" without much attention to what counts as religion. This is problematic because it is now well accepted that the distinction between what is religious and what is secular is generally rooted in the Western Christian tradition and more particularly related to theological responses to pluralization within Western Christianity following the Protestant Reformation and to philosophical challenges posed by the Enlightenment. Many religion scholars have further noted a pronounced Protestant Christian influence on defining religion as something that is individual, chosen, and private. In response to these criticisms, religion scholars have broadened definitions of religion to include many forms of life—collective and individual, doctrinal and mystical, scriptural and liturgical, a way of life and an aspect of it, etc. They have also helped clarify how

contemporary views on what is "secular" have been both historically and conceptually influenced by Protestant political theology.

In the second section, I will focus on U.S. Supreme Court cases like *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), that provide good examples of how free exercise claims challenge the dominant Christian notions of what is secular and what is religious. In *Lyng*, the Supreme Court characterized the central issue as "whether the First Amendment's Free Exercise Clause prohibits the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California." (*Id.* at 441-42). Writing for the majority, Justice O'Connor found that this road and timber harvesting may have an "extremely grave" impact on the efficacy of these religious rituals, which are site specific, and may even "'virtually destroy . . . the Indians' ability to practice their religion.'" (*Id.* at 451). Nevertheless, Justice O'Connor held that "[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, *its* land." (*Id.* at 453).

By contrast, Justice Brennan's dissent helps uncover disagreement between "Western religion" and Native American religions on what is secular and what is religious. He emphasizes that "*Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land.* The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. . . . Within this belief system, therefore, land is not fungible; indeed, at the time of the Spanish colonization of the American Southwest, 'all . . . Indians held in some form a belief in a sacred and indissoluble bond between themselves and the land in which their settlements were located.'" (*Id.* at 459-61 (emphasis added)). In other words, the legal definition of property rights is not secular, and the Court should accommodate the Native Americans' claim that the land in question is sacred. This alternative holding would not result in invalidating the prevailing notion of property rights but only recognize an exemption from that conception when it imposes a substantial burden on the exercise of religion.

In the last section, I will argue that cases like *Lyng* call into question the presumed secularity of the law and signal the need for a post-secular understanding of free exercise of religion. In a post-secular society, participants recognize that the classification of things as religious and secular is contested and in need of argument and debate. While a majoritarian democracy privileges the classification of the majority, the Free Exercise Clause should be understood as raising the question of whether an exemption from that classification can be granted to allow those in the minority to live in accordance to their competing classification of what is religious and secular. The possibility of religious liberty in a post-secular society thus requires vigilant awareness of the ongoing disagreements about classifications of what is religious and what is secular and an aim at minimizing the dominance of any particular classification and maximizing the ability of the coexistence of divergent classifications.