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Jordan Sanderson
Susquehanna University

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Legal Secularism and Politics

By Jordan Sanderson

I. Introduction

When the founding fathers of the United States of America first wrote the Constitution, they considered various risks that could damage the very nature of the democracy that they were constructing. They had just won their independence and in their eyes, anything that could bring about a tyrannical government once again would have to be prevented in the country's Constitution, after the Articles of Confederation proved to be too passive. For the anti-federalists, the Constitution seemed to give a great deal of power to the federal government and that centralized power is what they feared when fighting England's monarchy. Therefore, amendments were added to the Constitution, which would be known as the Bill of Rights. The beginning of the very first amendment goes as follows: "Congress shall make no law respecting an establishment of religion...ⁱ" The founding fathers were concerned with

ⁱ Anon. n.d. "U.S. Constitution: First Amendment." LII / Legal Information Institute. Retrieved December 14, 2016

what theological and religious law could bring to their new country, so they emphasized the importance of a secular state at the very beginning of the Bill of Rights.

Obviously, the United States is not the only state that has expressed the need for legal secularization in some way or another. However, the importance of the law in the United States and if it is religiously based or secularized is important for all and the intended audience of this review. The first amendment and the Establishment Clause did not prevent religiously based laws to become active policy in the U.S., but rather it has been a process over time. One could look towards various cases throughout the history of the United States to gather some idea of how religious influence has lost a hold on legislation and how secularization has progressed, but first, these concepts need to be understood and be compared to other countries in the world.

II. Understanding Legal Secularism

In its purest form, legal secularism itself refers to the specific ideology that reinforces the idea that public entities should be secular, not religiousⁱⁱ. What is not mentioned is the extent that secularism takes and if it means to exclude

(https://www.law.cornell.edu/constitution/first_amendment).

ⁱⁱ Sarat, Austin and Patricia Ewick. 2015. *The Handbook of Law and Society*. Chichester, West Sussex, UK: Wiley-Blackwell.

religion or simply to be neutral with it. Anglo-Saxon based languages tend to view the state of being secular as neutrality of religion and ideologies, while Latin based languages have found secularism as not an isolation between law and religion, but a separation between the two. As long as a secular entity is not connected with matters regarding religion or spirituality, it holds to standard. This inevitably makes most states secular since governments are rarely involved in these social arenasⁱⁱⁱ. When a state is moving away from religious foundations to a secular ideology, that is the process of secularization. Max Weber had his own theory on the control shift from religious institutional control to civil control. He saw it as a "radical spatial restructuration," where the previous two types of worlds, which are secular and religious, become a single secular world, forcing religion to find its own place in society. With these advances of secularization, religion leaves the political sphere and may be labeled as its own freedom of belief. The downside to this conclusion of secularization is that it simply suggests secularization as a "private choice," ignoring its own connection to one's identity, culture, and religion itself ⁱⁱⁱ.

Rafael Palomino observes the fact that many of these theories are based on European standards, making it difficult as a whole to compare it to other societies. However, since Europe and the United States are Westernized, there is some

ⁱⁱⁱ Palomino, Rafael. n.d. "Legal Dimensions of Secularism: Challenges and Problems." Retrieved December 10, 2016 (<http://eprints.ucm.es/12247/1/Palomino-secularism.pdf>).

weight and acceptability to the application of these ideas regarding the United States. The neutrality of secularism is not the only perspective of how a society may proceed with its implementation. Secularism can be taken as anti-religious rather than being neutral, attempting to rid religion from the public sphere all together and maintaining it only in the private arena ⁱⁱⁱ. For example, the United States, France, and Turkey are all secular state with no official religion that is enforced. In public schools, Turkey and France do not allow for their students to wear headscarves while the United States allows students to wear attire with religious symbols or connotation. Ideological conflicts in France and Turkey have led to this type of secularism that excludes religion from the public domain all together. However, the United States' secularism tolerates the public display of religion by an individual, taking a more neutral stance on this issue of what it means to be secular ^{iv}. A positive aspect of secularism is that it protects freedom of religion, especially in states that take the neutral stance on what it means to be secular. However, a negative aspect is that it causes tension between various social groups, which can be seen in almost all secular states. When dealing with religion, secularism must face challenges that go past just certain social groups

^{iv} Kuru, Ahmet T. n.d. "Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies toward Religion." Retrieved December 14, 2016 (http://www.jstor.org/stable/40060173?seq=1#page_scan_t ab_contents).

not getting along. Countries practicing secularism must understand how it factors into education, how laws are formed, if certain legislation has “religious sensibilities,” how individuals express themselves with religious clothing and symbols, and overall operational neutrality and how that is carried out. To confront these challenges, states and officials may practice these two general concepts on how to approach these issues with secularism. First, it might be best to encourage the formation of a strong, secular state to protect all freedoms from religions that may attempt to become too influential in the public sector. The second approach is to encourage understandings and tolerance of all religions, promoting unity among differing religious social groups ⁱⁱⁱ.

III. The Establishment Clause and Secularism

Legal secularism and its neutrality in the United States can be traced back to its most prominent implementation in the Constitution: The Establishment Clause. Recently, the abstract question concerning legal secularism is whether religious symbols on publicly owned property violates the Establishment Clause. Religious symbols in the United States are often discouraged in public institutions due to the instrumentalization of religion as a “service of the state.” Rather than secularization, however, society seems to be pluralizing, with a resurgence of religious people as well as rising untraditional or nonbelief groups. This has led to several court cases involving religious symbols such as the Bible, Ten Commandments, and other predominantly Christian symbols in the public arena being disputed if they

belong. Despite the tendency of secular beliefs to confront the Establishment Clause in the public sphere, it has not yet decided if religious symbols play a significant part in combatting an established religion, despite these court cases mentioned before ^v.

One public institution that still holds various religious symbols or leanings would be education. Primarily, sexual education. Naomi Cahn and June Carbone, two law scholars, hold critical viewpoints on how religion has influenced sexual education and the encouragement of the abstinence-only ideology. Using their own empirical data, Cahn and Carbone found that the abstinence-only policy stance in education has been proven to be ineffective time and time again, but it is an example of why a religiously influenced part of the public sphere should be reformed into the ideal secular version of itself ^{vi}. Though the Establishment Clause would likely find it to be unconstitutional, the reliance of Federalism in the American system itself is ineffective to change sexual education policy nationwide. As

^v Calo, Zachary R. 2012. “• High Law Secularism: Religious Symbols, Contested Secularism, and the Limits of the Establishment Clause.” *Chicago-Kent Law Review* 87(3). Retrieved December 4, 2016

^{vi} Hamilton, Vivian E., "Religious v. Secular Ideologies and Sex Education: A Response to Professors Cahn and Carbone" (2007). Faculty Publications. Paper 44. (<http://scholarship.law.wm.edu/facpubs/44>)

a society, this issue creates conflicts between a more religiously conservative social group and a more modernized, secular social group. To religious traditionalists, the absence of the abstinence-only sexual education policy would result in the youth of the country living immoral lives full of free sex. On the other hand, secularists view the current system as restricting the youth from experiencing their lives to the fullest and being married off too early. With this conflict and debate, there has yet to be a court case to resolve these issues and there may not be in the foreseeable future. However, Cahn and Carbone believe that combining secular and religious elements into sexual education may be the most effective way to bring change and solve the ineffectiveness of the current system^{vi}.

Legally, the first amendment and the Establishment Clause are protections from the government if it was to attempt to legally establish a religion in the United States. There have been multiple historic Supreme Court cases involving issues ranging from mandatory prayer and Bible readings, to policy encouraging voluntary prayer and copies of the Bible being distributed, with the vast majority of these cases finding these actions unconstitutional. *Wallace v. Jaffree* was a landmark court case which involved legislation implementing voluntary prayer again in public schools^{vii}. The case itself was filed by Ishmael Jaffree, who claimed that the school was indoctrinating his children and that peer pressure made them participate in what was supposed to be voluntary prayers. In the court, the justices found that there was no clear secular purpose to this legislative policy and that it was essentially an endorsement of religion. This main

point of legal secularistic thinking led the court to side with Jaffree. The dissenting justices in this case believed that the Establishment Clause did not include jurisdiction over moments of silence for voluntary prayer and meditation, and the court as a whole did consider that a future state statute may be constitutional even if it was to fulfill a religious purpose. Accompanied by this was the assessment that as long as a clear secular legislative purpose is sincere and not a sham in certain policy, then it may have some sort of religious principles which will pass the Lemon Test and the Establishment Clause ^{vii}. These two concepts would cause a small, grey line between the separation of church and state, which threatens the legitimacy of complete legal secularism as an overall social phenomenon.

A case that progressed legal secularism clearly and recently would be *Kitzmiller v. Dover Area School District*. At this point in America, most courts have already struck down creationism from public schools, which they find as endorsing religion and violating the Establishment Clause. However, religious and traditional proponents still attempt to find different ways to support religion in the public arena, whether that is by creating “anti-evolution laws” or implementing some sort of “creation science” to be another option than evolution. One new form of creationism

^{vii} Valerie B. Spalding, *Constitutional Law - Moment of Silence Statutes May Threaten the Wall of Separation between Church and State -*

Wallace v. Jaffree, 8 Campbell L. Rev. 125 (1985).

education pushed by religious advocates was the implementation of “intelligent design” curriculum, which would get as much time as Darwin’s theory of evolution and critique it^{viii}. The Dover School Board and their intelligent design curriculum violated both the Establishment Clause and the lemon test since an objective observer would view the policy as endorsing religion over the secular view of evolution. Referencing the concept of sincere and sham secular laws, the "secular" aspects of the implementation of intelligent design were labeled a sham. This was due to the fact that its supernatural aspects violate testable science, it confirmed itself as basically a law if evolution has any faults to it, and there were no peer-reviewed scientists that backed intelligent design besides the main proponents, which means it lacked third-party legitimacy. The fact that a school board was able to implement this policy at all shows how legal secularism and general secularism has yet to become popularized. Society needs to publicly accept secular beliefs such as evolution in order to discourage future religious advocacy movements from intervening in the legal sphere ^{viii}. With the current trends of religious groups attempting to influence the public sphere once more, it

^{viii} Lee, Brenda. n.d. “Kitzmiller v. Dover Area School District: Teaching Intelligent Design in Public Schools.” *Harvard Law Journal*. Retrieved December 10, 2016 (http://www.law.harvard.edu/students/orgs/crcl/vol41_2/lee.pdf).

would not be surprising if creationists advocates attempt to discredit evolution again in the future and try to introduce a new counter-evolution ideology in schools with little to none religious connection.

The final case that impacts society on a legal realm that will be observed is *Hein v. Freedom from Religion Foundation*. However, rather than supporting legal secularism, religion gained more influenced in the public sphere. The issue that brought this to court was that George W. Bush created the White House Office of Faith-Based and Community Initiatives to help give religious organizations federal grants and help them become more involved in communities. Since this body that George W. Bush created was part of an executive action, the legislative aspect of the Establishment Clause did not apply to this entity ^{ix}. Essentially, the executive branch gave the order, but the legislative branch funded the White House Office of Faith-Based and Community Initiatives. That meant that taxpayer money was being used to promote religious groups and endorse theological organizations as part of the government. When this case made it to the Supreme Court, the court made a decision of good faith which trusted the legislature to

^{ix} Michaels, Lauren S. n.d. “Hein v. Freedom from Religion Foundation: Sitting This One Out – Denying Taxpayer Standing to Challenge Faith-Based Funding.” *Harvard Law Journal*. Retrieved December 14, 2016 (http://www.law.harvard.edu/students/orgs/crcl/vol43_1/213-238.pdf).

intervene if the executive branch began to violate the Constitution. It itself, this is foolhardy since Congress itself passes legislation at a slow pace and supported the President in this case. Rather than acting as the Constitutional protectors they were appointed for; the Supreme Court took a pass on this instance of religious infringement on secularism. Along with that, the executive led bureaucracy now has the precedent that it does not need to be held to the same standards of the Establishment Clause that Congress does ^{ix}. With *Hein v. Freedom from Religion Foundation*, it is more difficult to challenge the executive branch for breaking the Establishment Clause and may send legal secularism and secularization back decades while supporting the resurgence of religious influence in the public realm.

IV. Free Exercise Clause and Legal Secularism

Department of Human Resources of Oregon v. Smith set a new precedent in 1990 concerning the government's jurisdiction over the Free Exercise Clause. Here, a Native American used peyote, a schedule I drug, to practice his religious beliefs. He was laid off and not given unemployment compensation due to his use of an illegal substance, which led him to take the Department of Human Resources of Oregon to court. The result of this case ended with the law being able to ban worship services if there is

misconduct, religiously motivated or not ^x. Besides the rules on misconduct, religious liberty based practices can be restricted and banned if a law is applicable in the general sphere and neutral towards religion ^{xi}. The latter consequence of the *Smith* decision stirred reactions from state governments and Congress. Bipartisan politicians worked together to enact Religious Freedom Restoration Acts, which rejected the precedents set by *Smith*. What the Religious Freedom Restoration Acts seek to do is protect against federal law if it challenges a religious practice. However, as long as the federal law is deemed neutral and “generally applicable,” religious liberty scholars Douglas Laycock and Steven T. Collis say that the *Smith* standard takes priority ^{xi}. Legal secularism is challenged by the enacted Religious Freedom Restoration Acts because this legislative action implies that not all laws are applicable to all citizens and neutral to their beliefs. Claiming that some laws are more neutral and generally applicable implies that

^x"Employment Division v. Smith." LII / Legal Information Institute. Accessed February 28, 2017.

(<https://www.law.cornell.edu/supremecourt/text/494/872.>)

^{xi} Laycock, Douglas, and Steven T. Collis. "Generally Applicable Law and the Free Exercise of Religion."

Nebraska Law Review 95, no. 1 (2016): 1-27. Accessed February 28, 2017.

<http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2986&context=nlr>.

other laws are not neutral and have religious bias. One can interpret any religious bias in law as a means to establish a religion. The *Smith* standard acknowledges the existence of non-neutral laws, resulting in a conflicting contradiction. This contradiction puts the Establishment Clause and its secular values against that of the Free Exercise Clause's recent interpretations by Congress and states.

V. Kimberly Hively vs. Ivy Tech Community College of Indiana

As of April 2017, the court case involving Kimberly Hively and Ivy Tech Community College of Indiana may drastically impact the progress of legal secularization in the United States. The court case itself involves the Civil Rights Act of 1964, specifically Title VII. The legislation states that "Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin^{xii}." Concerning secularism, this means that an employer may not fire an employee based on these characters. However, this originally did not protect an individual whose sexual orientation conflicted with an employer's religious beliefs. Many LGBTQ+ members have been fired for their orientation, but United States Court of Appeals for the Seventh Circuit effectively changed the precedent. Judge Diane Wood delivered the majority opinion, which ruled that Title VII of the Civil Rights Act of 1964 also forbids sexual orientation discrimination in the workplace^{xiii43}. Most judges

^{viii} Sunstein, Cass R. "Civil Rights Ruling Protecting Gay Employees Likely Headed to Supreme Court: View."

have argued that private employers have the right to discriminate against LGBTQ+ people. The dissenting opinion agreed with this thought process, claiming that the 1964 Congress did not intend to have this legislation protect people on the basis of their sexual orientation. Judge Wood used the reasoning that had she been a man in a relationship with a woman, Kimberly Hively would have not been fired^{xiii}. Therefore, the protection of one's sex by Title VII indirectly protects one's sexual orientation.

A cause of sexual orientation discrimination is that of an employer's religious beliefs, which may ideologically believe that being part of the LGBTQ+ community is sin against the beliefs of the religion's followers. Before *Hively v. Ivy Tech*, this religiously motivated discrimination was protected in the eyes of the law. The majority's ruling of the United States Court of Appeals for the Seventh Circuit changed this standard. However, this may only have a temporary benefit to legal secularization. It is expected that this ruling will be appealed by Ivy Tech Community College of Indiana and be heard by the Supreme Court. Since a majority of the justices on the Supreme Court have a conservative leaning, it is likely that this ruling will be overturned. However, Judge Wood's interpretation will likely be referenced in future cases and arguments, furthering the conversation to bring forth secularization to counter religious discrimination. If the ruling is maintained,

Insurance Journal. April 07, 2017. Accessed April 08, 2017.

<http://www.insurancejournal.com/news/national/2017/04/07/447241.htm>.

then that level of secularization has begun to be accomplished.

VI. Conclusion

Overall, legal secularism and religion in law have been two conflicting actors for centuries. In the United States, the Establishment Clause in the first amendment is the basis for many cases involving the sponsorship of religion in the public sphere. In the United States, the stance of being secular is more passive neutrality rather than an active effort to rid religion for the public indefinitely. However, despite it being neutral there has been court cases that have clearly been pro-secular, blurred the lines between the separation of church and state, and encouraged the resurgence of religious influence in the government arena. The Establishment Clause is not a perfect defense, but it is one of the most prominent walls blocking an established religion in the United States. However, contradictions have occurred between the Establishment Clause and Free Exercise Clause, which will hopefully be clarified once Religious Freedom Restoration Acts are challenged in the future. Finally, the end result of *Hively v. Ivy Tech* has yet to be decided. If it is upheld then a degree of legal secularism would have been achieved, but it will likely be reversed. Time will tell if secularization will continue with more support of legal secularism, or if more loopholes will be exploited.

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- ⁱⁱⁱ Palomino, Rafael. n.d. “Legal Dimensions of Secularism: Challenges and Problems.” Retrieved December 10, 2016 (<http://eprints.ucm.es/12247/1/Palomino-secularism.pdf>).
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^{vi} Hamilton, Vivian E., "Religious v. Secular Ideologies and Sex Education: A Response to Professors Cahn and Carbone" (2007). Faculty Publications. Paper 44.

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^{vii} Valerie B. Spalding, Constitutional Law - Moment of Silence Statutes May Threaten the Wall of Separation

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Standing to Challenge Faith-Based Funding." *Harvard Law Journal*. Retrieved December 14, 2016

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^x "Employment Division v. Smith." LII / Legal Information Institute. Accessed February 28, 2017.

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^{xi} Laycock, Douglas, and Steven T. Collis. "Generally Applicable Law and the Free Exercise of Religion." *Nebraska Law Review* 95, no. 1 (2016): 1-27. Accessed February 28, 2017.

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^{vii} "Title VII of the Civil Rights Act of 1964." Title VII of the Civil Rights Act of 1964. Accessed April 08, 2017.

(<https://www.eeoc.gov/laws/statutes/titlevii.cfm>.)

^{viii} Sunstein, Cass R. "Civil Rights Ruling Protecting Gay Employees Likely Headed to Supreme Court: View." *Insurance Journal*. April 07, 2017. Accessed April 08, 2017.

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