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## Once More with Feeling: Getting the Story of Religion and Law Straight

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## “ONCE MORE WITH FEELING: GETTING THE STORY OF RELIGION AND LAW STRAIGHT”

Winnifred Fallers Sullivan\*

SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* (Harvard Univ. Press 2010). Pp. 352. Hardcover. \$29.95.

STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (Harvard Univ. Press 2010). Pp. 304. Hardcover. \$26.95.

These two books, both by U.S. law professors, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* by Sarah Barringer Gordon<sup>1</sup> and *The Disenchantment of Secular Discourse* by Steven D. Smith,<sup>2</sup> are works both of passion and of frustration. Each intervenes urgently in the contemporary discussion about the role of religion in American public life to offer a corrective to the story. Gordon wants us to see the spirit of popular legality as a rebuke to technical professional law; Smith wants us to stop telling secular lies about what we want from the law. Each wants law to “get religion,” and by religion, they mostly mean a particular version of Christianity.

Professor Gordon observes at the end of her book on litigating the religion clauses in the last seventy years, that it has only now become possible to see the mid-twentieth century changes wrought by incorporation. Only now, when that experiment in federally implementing American style accommodation is effectively over, can we see clearly the events and the players that transformed the politics of U.S. religion over that time. More recent decisions by the U.S. Supreme Court have drawn back from the active judicial supervision of religion in the United States that was initiated by *Cantwell v. Connecticut*<sup>3</sup> and *Everson v. Board of Education*.<sup>4</sup> Gordon contends that, beginning in 1940, not only was new constitutional law created, but a new form of religious activism was produced, one in which a varied group of religious actors seized the moment and advocated for what Gordon terms popular constitutionalism.<sup>5</sup> The Court more or less acceded to their

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1. SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* (2010).

2. STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (2010).

3. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

4. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

5. I take it that Professor Gordon wishes to use “popular constitutionalism,” or what she sometimes calls

demands, making possible what she calls a “new constitutional world.”<sup>6</sup>

*The Spirit of the Law* is addressed to the general reading public, rather than an academic one. References to academic historians and legal theorists are rare and footnoting is minimal, but Gordon is clear that she wishes to breathe life into academic accounts of the First Amendment religion clauses as well as to inform a more popular audience. She offers five case studies in five chapters: the challenge to patriotic exercises in public schools made by Jehovah’s Witnesses, the school funding cases, Nation of Islam actions to achieve prisoners’ rights, conservative Christian efforts to change what they saw as secular humanist school curricula, and the effort to legalize gay marriage. In each of these chapters, Gordon introduces us to the litigants and their causes, giving us the backstory and showing us how vernacular understandings of the religion clauses enabled the expression of often awkward and unpopular projects to make space for religious life. The first chapter offers a historical overview of the regulation of religion in the United States, situating the story of the mid twentieth-century changes in a longer narrative of the administration of religious liberty in the U.S... A brief epilogue provides an assessment of the value of what popular constitutionalism has created.

While other stories could be told about law and religion in the United States during this period — indeed, almost endless curious and illuminating stories exist — and some of the history she tells has been told in other places, Gordon engagingly reminds us of the social history driving recent doctrinal development of the religion clauses. She shows us once again, in a now conventionalized form, what Judge Noonan called the “persons and masks of the law.”<sup>7</sup> There are many marvelous stories and characters in *The Spirit of the Law*, but particularly illuminating to this reader was the history of the captive school cases and the interesting links between Elijah Muhammad, leader of the Nation of Islam, and Joseph Rutherford, the architect behind the Jehovah’s Witnesses cases.

The little-known saga of the effort to rid the country of “captive schools” effectively illustrates the story Professor Gordon is telling.. We are taught to believe that in the beginning, before Catholics started seeking public funding and other favors, there were two kinds of schools in the United States: secular public schools and private Catholic schools. However, it turns out things were a lot messier;. many “public” schools in the country were actually a kind of hybrid, “captives” of the Roman Church, in the words of angry Protestants. In New Mexico, for example, there were schools that were both parochial and public. “By 1948, according to a National Catholic Welfare

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“lived constitutionalism” to describe a parallel form of vernacular legality, coexisting with formal legal institutions, or what she calls “technical constitutionalism,” a vernacular legality that is always available in the United States (and maybe everywhere) to motivate litigants and supply new “emancipatory” life to dry legal bones when necessary. See GORDON, *supra* note 1, at 119-20. She seems undecided, even deeply ambivalent, about its value. *Id.* at 208-16. Professor Gordon does not directly engage the extensive contemporary academic debate about popular constitutionalism, what it means, and whether it is a useful concept. This debate has been particularly active in connection with the decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). For discussion on popular constitutionalism, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

6. GORDON, *supra* note 1, at 4.

7. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WHYTHE AS MAKERS OF THE MASKS* (1976).

Conference survey, there were at least 324 ‘Catholic-public’ schools and most likely 340 or more.”<sup>8</sup> In public schools in heavily Catholic parts of the country, many of the teachers were nuns and priests. Horrified by this situation — and by Justice Black’s opinion in *Everson* finding that New Jersey’s school busing law providing reimbursement for bus fare to parents of parochial- as well as public-school students benefited children and not religion — a national campaign was undertaken by Protestants and Others United for the Separation of Church and State and its allies to protect American schoolchildren from “priestcraft.”<sup>9</sup> In other words, the captive school cases played the same role for anti-catholic Protestants at mid-century as the Ten Commandments cases do for rank and file members of the ACLU today: they mobilized the forces of “popular constitutionalism,” in support of their respective projects to cleanse public spaces and institutions of the wrong kind of religion..

The role of the Nation of Islam in prison ministry, like the story of the captive school cases, also deserves to be better known, although for different reasons. What will be surprising to many are the unlikely connections between the Nation and the Witnesses. Again, Professor Gordon takes us behind today’s packaged pieties — in this case, the tidied up story of Martin and Malcolm — and shows us the deliberate effort of an earlier generation of black Americans to achieve rights. Elijah Muhammad, founder of the Nation of Islam had been imprisoned for draft evasion during World War II, and had served his sentence in the Milan prison in Michigan with other draft resisters, including Witnesses and Quakers. After his release, Muhammad engaged in a campaign to achieve prisoners’ rights in law, emulating the litigation tactics of the Jehovah’s Witnesses and their leader, Judge Rutherford. “Ideas, legal strategies, and even religious doctrines traveled between the two groups of believers, who understood themselves as beset by a hostile and diabolical state.”<sup>10</sup> Gordon carefully details the long campaign by Black Muslims to have their religious practices recognized as legitimate and deserving of accommodation by prison authorities.<sup>11</sup>

Although Gordon suggests in her preface that each group of activists she introduces to the reader brought life and spirit to the dead letter of the law, in each of the chapters one also has a sense by the end that each project was of limited use to the group itself — that, if they did bring life to the law, they did not necessarily bring lasting life to their respective communities. Those communities were useful to the law, perhaps, in the sense that they changed what the law was doing with respect to religion for a time, but each now lives in a judicial world that has largely rejected their efforts. Now, as Gordon puts it, “[t]he world that brought believers to law and law to believers is under siege.”<sup>12</sup> “Constant and unpredictable change in patterns and practices of faith have defied attempts to construct clear boundaries around religion in scholarly work as well as in

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8. GORDON, *supra* note 1, at 57.

9. *Id.* at 69.

10. GORDON, *supra* note 1, at 96.

11. Religion is pervasive in American prisons today and federal law guarantees that prisoners will have space for their religious life. The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2006). Recent works on prison religion include JOSHUA DUBLER, *SEVEN WEEKS OF PENITENTIARY LIFE* (2011), and WINNIFRED FALLERS SULLIVAN, *PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION* (2009).

12. GORDON, *supra* note 1, at 209.

judicial decisions.”<sup>13</sup>

Gordon insists, though, that whereas formal constitutional doctrine about religion may be in disarray,<sup>14</sup> “popular constitutionalism is alive and well.”<sup>15</sup> And so is religion. She argues that ordinary Americans, through this litigation, learned to cooperate across religious lines: “When Americans do religion in law, they construct alliances and have conversations across denominational, organizational, and ideological boundaries. They understand themselves to have sacred rights and generally recognize that others do, too.”<sup>16</sup> That, she says, has been the real benefit of popular constitutionalism. Well, perhaps. Certainly the constitutional litigation of which Professor Gordon writes repeatedly made strange bedfellows across sectarian divides. Evidence of such unlikely alliances can be found in the coalition that lobbied for RFRA as well,<sup>17</sup> but the pervasiveness and toxicity of hostility toward Islam in the United States today, and the enthusiasm for Christian evangelism suggests that work remains to be done.

As religious freedom advocacy proliferates internationally,<sup>18</sup> this is a moment not only for seeing the distinctiveness of the period of U.S. history about which Professor Gordon writes, but also for seeing the distinctiveness of U.S. legal and social culture more generally with respect to religion. Disestablishment has produced a particularly chaotic religious field in the United States. One of the enduring challenges for interpreters of the religion clauses is finding an appropriate referent for the word “religion.” It is not easy to know precisely what the founders meant by the word or what we might mean by the same word today. And yet this book helpfully reminds us what a useful word it has been for Americans. While Gordon is not particularly interested in sorting out religion from non-religion, legally-speaking, she does have a strong idea about what she means by religion in this book. What her protagonists have is “spirit.” She seems to mean by this that their religion, like that of most Americans, is not bound by historic institutions, but rather spills out everywhere in protean and fissiparous forms,

Gordon presents the eccentric characters of this book as religious only in the sense that constitutional incorporation of the religion clauses gives them their moment on the public stage, what she calls a new “legal consciousness.”<sup>19</sup> It gives their religion the legal personality of popular constitutionalism. She is not much interested in and does not much admire their theology. She speaks of the Jehovah’s Witnesses and says, “[t]hey

13. *Id.*

14. In her Epilogue, Professor Gordon addresses other scholars who write in this area, including myself, chiding us for our lack of faith. *Id.* at 208-16. “[L]ived constitutionalism,” she says, does a better job than we acknowledge. *Id.* at 214. Curiously, she does not mention the important work of Philip Hamburger, who also tells the story of popular constitutionalism in this area and its effect on constitutional doctrine. PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002).

15. GORDON, *supra* note 1, at 212.

16. *Id.* at 216. Such cross-denominational cooperation was not, of course, new in American public life. It has been a peculiar feature of American disestablished religion since the early Republic when Protestants cooperated on various projects of public improvement.

17. Unlikely bedfellows are also evident in the amici filings in the *EEOC v. Hosanna Tabor* case now before the Court.

18. It is difficult to exaggerate the extent of the proliferation of efforts to legally enforce rights to religious freedom in the world today. A parallel explosion of academic research on the topic is also evident.

19. GORDON, *supra* note 1, at 134. For another account of the recent story of religion and law through a withdrawal from litigation, see DAVID ENGEL AND JARUWAN ENGEL, *TORT, CUSTOM, AND KARMA: GLOBALIZATION AND LEGAL CONSCIOUSNESS IN THAILAND* (2010).

preached a dreadful apocalyptic prophecy.”<sup>20</sup> She describes Protestants and Other Americans United for the Separation of Church and State with their repellent anti-Catholicism,<sup>21</sup> Black Muslims supporting a separatist movement of outsiders who “could readily resort to more militant, even violent action,”<sup>22</sup> Beverly LaHaye and the Concerned Women for America are engaged in a “holy war” against public school readers and “secular humanism.” In the end, while Gordon (and, perhaps, we) may admire their energy and spunk, we are not invited into the religious worlds of these litigants. We are not sure why all of these people believe and do these odd things and why they, or indeed any group of religiously motivated people, all should be grouped together and protected by the Constitution. In Steven D. Smith’s words, we are not sure any more why religion should be treated differently. As discussed below, Smith sees this inability to defend special legal protections for religion as a larger and broader failure of U.S. constitutional law in this area.<sup>23</sup>

Framing Gordon’s case studies and her reading of the constitutional law of this period, however, is a more ambitious argument, signaled by the portion of her title before the colon, *The Spirit of the Law*. As Gordon explains in her Preface, she sees her case studies as battles in a larger struggle between the spirit and the letter of the law, or, rather, a larger struggle to infuse law with spirit. American religious activists are portrayed as warriors of the spirit seeking to bring life to a dry technical legal machinery, “the spirit-filled” against “the law-bound,” as she says.<sup>24</sup> What is revealed through this litigation is “the true meaning of the Constitution’s religion clauses,”<sup>25</sup> and maybe even of law more generally. In her Preface, Professor Gordon articulates what she seems to take to be an essential tension between letter and spirit, one that is iconically expressed for her in Paul’s Second Letter to the Corinthians in the New Testament.<sup>26</sup> It is unclear whether she means to do this, but it seems strange, even disturbing, at this time in history, to define a study of legal protection for religious freedom using explicitly Christian terms, particularly these terms. As Gordon acknowledges throughout the book, one of the reasons the Court has withdrawn from this field is the extraordinarily broad reference now encompassed by the word religion. However, it is not simply that a grounding reference to the New Testament is Christian, and therefore suspect as majoritarian in a country with a highly diverse religious population. It is that the very language she quotes from First Corinthians, “for the written law condemns, but the Spirit gives life,”<sup>27</sup> has long been used to underwrite a polemic against Jews and Jewish legalism.<sup>28</sup>

The spirit of her title has, of course, another reference. While Gordon mentions her

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20. GORDON, *supra* note 1, at 29.

21. *Id.* at 69.

22. *Id.* at 112.

23. SMITH, *supra* note 2, at 149-50.

24. GORDON, *supra* note 1, at x.

25. *Id.* at 12.

26. 2 *Corinthians* 3:6.

27. GORDON, *supra* note 1, at ix (quoting 2 *Corinthians* 3:6).

28. See generally, Robert A. Yelle, *Moses’ Veil: Secularization as Christian Myth*, in *AFTER SECULAR LAW* (Winnifred F. Sullivan et al. eds., 2011).

debt to Montesquieu,<sup>29</sup> she does not really explain why she makes the reference; apart from the cleverness of the title, it is not clear that Montesquieu is helpful to her. Montesquieu's spirit is not Paul's, and one wonders whether he would have been as enthusiastic as Gordon with the form of American populism she evokes. His was the deist religion of the eighteenth century *philosophe*. He favored religious tolerance but viewed law as a progressive endeavor. The spirit of which Gordon speaks is the product of a pietist religious movement that in many ways responded against the rationalism of the Enlightenment.

Are Gordon's stories really about the triumph of spirit over law? What can this really mean? Is that a good thing? Is there any law that is not informed by spirit? An alternative framing of these stories might begin with Robert Cover and his suggestion that all human life is characterized by a constant generation of *nomoi* and narratives, a generation which is accompanied by an equally constant destruction.<sup>30</sup> People make law, and people suppress law, state law and non-state law. The law that is made is always connected to narratives about the meaning and value of human life. It is illuminating to compare Cover's and Gordon's accounts of *Bob Jones University v. United States*.<sup>31</sup> Gordon discusses the case in connection with conservative Christian efforts to change the school curriculum. She sees in the *Bob Jones* decision denying a tax exemption to the university because of its interracial dating policy an example of the secularist value of desegregation triumphing over religious freedom.<sup>32</sup> Cover also discusses the case, but he does not distinguish between religious and secular *nomoi*.<sup>33</sup> For him, what a close reading of the opinions in *Bob Jones* illustrates is the weak commitment of both Bob Jones University and the federal government, each unwilling to go decisively to the mat for their values. The value of desegregation is not lesser for Cover because it is not explicitly religious. For Cover, law is transformed not through spirit but through the power of the alignment of narrative and *nomos*. That alignment was not achieved for either side in *Bob Jones*, as he saw it.

In her introductory chapter, Gordon describes the last seventy years of constitutional litigation about religion as a "new constitutional world," a world distinct from the two previous ones. Her periodization of religion and law in American history begins with the Revolution. The first period is from the 1770's to the 1840's, the period of final disestablishment; it was followed by a second constitutional world dominated by intrusive state law, from the 1840's to the 1940's.<sup>34</sup> "The new world," the period of the

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29. CHARLES DE MONTESQUIEU, *DE L'ESPRIT DES LOIS* (1748).

30. Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

31. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

32. GORDON, *supra* note 1, at 155-56. Gordon herself refers to Cover's article in an endnote, characterizing Cover as a "liberal law professor" and suggesting that Beverley LaHaye, leader of Concerned Women for America, and Robert Cover viewed the case in a similar way. *Id.* at 276 n.146.

33. For many religious studies scholars today, the distinction itself would always be problematic. See, e.g., TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003); TOMOKO MASUZAWA, *THE INVENTION OF WORLD RELIGIONS OR, HOW EUROPEAN UNIVERSALISM WAS PRESERVED IN THE LANGUAGE OF PLURALISM* (2005). For an important discussion of why Judaism is not properly categorized as a religion, see Daniel Boyarin, *Rethinking Jewish Christianity: An Argument for Dismantling a Dubious Category (to which is Appended a Correction to my Border Lines)*, 99 JEWISH Q. REV. 7 (2009).

34. It is curious that Gordon decides to omit the colonial period. The new history suggests that it is in the two centuries before the beginning of her story and in the wider context of the Atlantic rim that the peculiar

book, is when popular constitutionalism flourishes and the spirit takes over, after the 1940's. This is, of course, a world that has also been defined by the culture wars. One must ask whether the litigation generated in the wake of incorporation of the religion clauses infused the law of the religion clauses not with spirit, but with conflict.

It is unquestionably the case, however, as Gordon importantly asserts, that there is a sense in which the social history of religious freedom in the U.S. remains to be written. There is much more to both disestablishment and free exercise than is reflected in constitutional litigation, or in the conventional narrative about religion and law in the United States. The peculiar nature of American religion owes much to a vernacular legal culture that exists — and has always existed — outside formal legal doctrine. Popular American legal culture enables the wonderful contradictions of American religious life, in which everyone tries to have their cake and eat it too. Lacking the established religious authorities that exist in most countries to determine what counts as religious, American religion is both hidebound and entrepreneurial, priestly and prophetic, moralistic and outrageous, all at the same time. Being religious is something Americans do. It should not surprise us that whether trying to bring up children, reform criminals, or live out sexual identity, Americans will do it religiously. That is what sets us apart from the imagined arid secularism of the Europeans, the frightening atheism of the communists, and the violence of the others. Gordon contributes to the telling of the story by linking popular religion with popular law.

Gordon's is a story of success, the success of American religious freedom. Steven Smith's story, told in *The Disenchantment of Secular Discourse*, is one of failure — although it is also, in a sense, a story of American religious freedom. Smith argues that we are today living on borrowed time, that our public discourse is increasingly captive to the iron cage of rationality, purged of all life by secularist habits, and “insufficient,” in his words, “to convey our full set of normative convictions and commitments.”<sup>35</sup> Our public discourse, he says, is basically dishonest, enabled by a pervasive habit of smuggling, smuggling being the practice of relying on religious values while employing neutral legal language. The failure to acknowledge such dishonest habits, Smith believes, results in a largely false public discourse. He wants us to fess up and admit that we are religious.

In successive chapters, Smith considers what he sees to be the pretended autonomy of end of life decision-making, the hollowness of the harm principle, the lack of foundation today for the wall of separation between church and state, the thin notion of the human underlying human rights discourse, and our inability to affirm value in the face of scientism. We cannot say what a good life is, what constitutes harm, why church and state should be separate, what constitutes human dignity, or, indeed, even why values should sometimes triumph over scientific progress. In each chapter, Smith deftly shows us the sleights of hand by which these lies are accomplished and how we avoid talking about what is really important. For example, in the chapter on the religion

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conditions of American religious liberty were formed. See, e.g., Evan Haefli, *Toleration and Empire: The Origins of American Religious Pluralism*, in *THE OXFORD HISTORY OF THE BRITISH EMPIRE* (Stephen Foster ed.) (2011).

35. SMITH, *supra* note 2, at 39.



clauses, Smith decries what he sees as a shift over the last century or so from a principled commitment to separation of church and state and freedom of conscience to the weasally language of equality and neutrality. That shift reflects, he says, our unwillingness to see the value and distinctiveness of religion.<sup>36</sup> Gordon's account might be read as giving support to Smith's despair, displaying, as it does, the displacement of substance by form.

Smith describes two secular normative families that dominate public discourse today: the autonomy-liberty-freedom family and the equality-neutrality-reciprocity family. Each, in his view, pretends to answer questions while allowing us to avoid dealing with the real issues. We are unable to give any good reasons for the eventual decisions we make because the real reasons have been ruled out of order. Whether we are talking about death and dying, harm, religious freedom, human rights, or the limits of science, we carefully avoid talking about what really matters.

Smith's is a thoughtful, beautifully written, and affecting book, even seductive. It is also deeply personal — a *cri de coeur*. Is he right? Is it really this bad? And is our predicament really the result of a collective refusal or denial founded in a nihilistic secularism? Is it really the case, as he concludes, that “[u]nable to acknowledge its deeper, determining strata, our discourse is condemned to superficiality?”<sup>37</sup> What are these deeper strata and who are “we?” Smith's book is full of the first person plural. What “we” — American academics, actually law professors for the most part — seem to be refusing to acknowledge in “our discourse” is the irreducibly religious nature of the human project. Why can't we, Smith pleads, like Thomas More, stand up and die for our faith?<sup>38</sup>

While it may be time to fess up to a certain exhaustion of the secular legal discourse, it is not the case, in my view, that the families of thought Smith describes have been merely dishonest efforts to avoid talking about what matters. It seems important to acknowledge that fact in order to understand both its failure and to be realistic about the available alternatives. Liberty and equality have done revolutionary work; they remain potent in many contexts, reimagined for another people and another time. They are not always dissembling modes of speech.

Disappointingly for this reader, the alternative resources that Smith recommends are rather obvious and classic sources for the most part, and, as with Gordon, the cure for the secularism of law seems to be mostly Christian. When he allows himself occasionally to imagine an alternative world, one in which John Courtenay Murray, Roger Williams, Thomas More, and Joseph Vining — rather than John Stuart Mill, John Rawls, and Martha Nussbaum — guided our discourse, Smith does not move much beyond the narrow circle of elite Anglo-American legal and political philosophy. Furthermore, his alternative exemplars themselves also offer an austere vision of human life, almost as austere as the secular ones. One wonders where the color is, where the myth and ritual and communal life that sustain and form religious individuals and the values for which Smith yearns find a place. More arguably died not for an idea but for the community she loved.

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36. *Id.* at 149.

37. *Id.* at 211.

38. *Id.* at 119, 121.

Steven Smith's title and topic suggests a broader conversation today about the nature of the secular among philosophers and social scientists. He does not refer much to this broader conversation, but many of its participants see a more complex and rich set of resources with which to think about and construct the human condition after secularism. One strand of the current critique of the pretensions of secularism is grounded in the genealogical work of anthropologist Talal Asad and his *Formations of the Secular*.<sup>39</sup> Asad and others have persuasively argued that secularism is itself founded in Christianity, and that its understanding of the human and of the human community is deeply grounded in Christian theology. Asad and others urge a re-telling of the history and anthropology of modernity, and of the secular that accounts for multiple and layered sets of origins and influences.<sup>40</sup>

The best cure for despair about American law, in my view, is to look beyond the legal academy and the university, and beyond the borders of the United States. Most people on the planet agree with Smith and Gordon that legal secularism, while valuable in its place, does not provide a very satisfying place in which to live; they are busy arguing about and experimenting with how to do pluralism, justice, and good government. They are doing so with the rich resources of the planet's diverse cultural and religious ways of imagining and living. Religion is not being systematically excluded everywhere, but it is being transformed. Popular religion and popular constitutionalism are alive and well not just in the United States, but in Tunisia, Brazil, Sri Lanka, and even France. It is time for the story of law and religion in the United States to be told as a part of this longer and broader story, one in which legal pluralism and shared sovereignty seem more and more plausible as modes of coexistence.

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39. See generally, ASAD, *supra* note 33.

40. See also DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2008).

