WORKING WITHIN THE IMMANENT FRAME:
HOW CHRISTIAN CONSERVATIVE LEGAL CLAIMS REINFORCE SECULARISM

Dr. Jason E. Whitehead, J.D., Ph.D.
Associate Professor of Political Science
California State University, Long Beach

Prepared for Presentation at the Annual Meeting of the
Western Political Science Association
April 2-4, 2015
Las Vegas, NV

Abstract: Conventional wisdom holds that, for better or worse, Christian conservatives seek to resist the secularization of American society and to champion Christian moral standards in law and politics. In his book, *A Secular Age,* however, Charles Taylor argues that, over time, Christianity has paradoxically helped to bring about and reinforce secularization in western society by reinforcing a "Modern Moral Order." Within this order, society is not seen as organically connected to higher moral principles; rather, society exists to recognize rights and obligations justified based only on the mutual benefit of its members. The Modern Moral Order slowly replaces a transcendent frame of reference with an immanent one, where human actions are judged only by agreed-upon standards. The immanent frame, Taylor argues, reinforces secularism in law, politics, and society by reducing legal and moral arguments to competing and increasingly irresolvable claims about ordinary human flourishing.

This paper attempts to "test" Taylor's argument by examining claims made in briefs filed by Christian conservative legal groups in *United States v. Windsor, Hollingsworth v. Perry,* and *Burwell v. Hobby Lobby*. My goal is to discover whether the legal claims made in these briefs (1) resist modern secularization through the use of transcendent (higher law) logic or (2) tacitly or openly accept modern secularization through the use of immanent (positivist) logic. I find that, although Christian conservative legal activists sometimes rely on transcendent logic, most of their arguments are immanent -- consistently deferring to social agreement, majority will, mutual toleration and other hallmarks of the Modern Moral Order. I argue that this Christian conservative acceptance of the immanent frame is problematic because it reinforces the pathologies of contemporary American moral discourse and obscures the potential for a more robust and authentic Christianity capable of radically transforming individuals and communities.

I. Introduction: Charles Taylor, Christian Conservativism, and the Debate Over Legal Legitimacy

There is a long history of debate over what makes a law legitimate. The ancient Natural Law tradition argues that legal legitimacy is created by a correspondence between human law and objective truths which, while transcending human existence, can nevertheless be accessed and applied through the use of human reason. Aristotle, for example, argues that true justice is only possible in the rightly-ordered state where the common good is pursued over selfish interests (1958, 21). In such a state, law acts as an educator, teaching us to follow the dictates of "reason, free from passion" (ibid.). The same is true for Cicero, for whom law is "the highest reason, implanted in nature . . . ." (1958, 44). It is likewise true for Aquinas, who argued that "the rule and measure of human acts is the reason, which is the first principle of human acts. . . ." (1958, 57). Precisely because of this correspondence between human law and objective truth, the crown jewel of Natural Law jurisprudence has always been the maxim: *Lex iniusta non est lex* (an unjust law is not a law) (Aquinas, 1958, 72).

The resulting chain of legal legitimacy thus runs from the top down, as follows:

God/final end/first cause

↓

Universal laws (objective moral standards)

↓

Community/individual deliberation (objective reason)

↓

Human ("positive") Laws

By contrast, the modern science of Legal Positivism aims to demonstrate logically that legal legitimacy can and should be separated from any transcendently objective truth or moral norm. Positivism claims instead that law is grounded in human power relations – whether Hobbes's social compact (1958, 119-20), Austin's sovereign command, backed by force (1958, 338-9), or Bentham's index of social utility (1958, 262-3). Of course, as Hart showed, raw human power alone is not necessarily legitimate (1961, 80-82). It must be enacted, interpreted and applied through the proper institutional procedures, which could include democratic procedures (ibid., 89-96). But, while those procedures account for the sense of obligation to follow law, there is no getting around the fact that the procedures themselves are put in place, and gain their authority, through political power. They are emphatically *not* grounded in objective moral norms, as evidenced by Hart's famous conclusion that even the monstrously immoral Nazi laws should still be seen as legitimate, though immoral, laws (Hart 1958).

This alternative chain of legal legitimacy thus runs from the bottom up, as follows:

Positive Laws

↑

Institutional enactment/enforcement

↑

Social agreement

↑

Human power struggle (calculating reason)

This transition from a transcendent to an immanent basis for legal legitimacy is part of a larger change in what Taylor calls the "social imaginary": the ways in which people "imagine

their social existence, how they fit together with others, how things go on between them and their fellows, the expectations which are normally met, and the deeper normative notions and images which underlie these expectations" (Taylor 2007, 171). In any era, the social imaginary "incorporates a sense of the normal expectations that we have of each other; the kind of common understanding which enables us to carry out the collective practices that make up our social life" (Taylor 2007, 172). This social imaginary acts as a "largely unstructured and inarticulate" background against which all thoughts and actions make sense (Taylor 2007, 173).

The replacement of natural law arguments about legal legitimacy with legal positivist ones involved an even more massive replacement of an older transcendent social imaginary with a newer immanent one (Taylor 2007, 126-30). Whereas in the transcendent frame, human actions were judged in light of their correspondence to higher, divine laws and purposes, in the immanent frame, human actions are considered self-constituting (Taylor 2007, 194). The new immanent frame gave rise to what Taylor calls the "modern moral order" (MMO) (Taylor 2007, 159-71). Within the MMO, society is not seen as organically connected to higher moral principles; rather, society exists to recognize rights and obligations justified based on the mutual benefit and ordinary human flourishing of its members (Taylor 2007, 150-51; 157-58; 170-71).

As Charles Taylor masterfully describes, reforms within Christianity – both the Protestant Reformation and earlier trends within Catholicism – had a great deal to do with the development of the MMO. Christianity became more disenchanted, individualized, and filled with temporal disciplines (Taylor 2007, 90-207). This "great disembedding" of Christianity replaced a network of *agape* with a social order based on a moral code (Taylor 2007, 155-58). The "great disembedding" went hand in hand with an "anthropocentric shift" whereby both church and society came to accept the theory of "providential deism" – the idea that God designed the world

through impersonal laws that can be discovered and managed by objective human reason (Taylor 2007, 221-95). "Providential deism," in turn, justified modern innovations like pluralism and individualism, which became increasingly autonomous from any religious justification (Taylor 2007, 281). This increasingly pluralized and objectified society gave rise to a "nova effect," in which subjective, immanent narratives came to dominate art, science, politics, and even spirituality (Taylor 2007, 352-535). In short, according to Taylor, the secularization of modern society came about, in part, because of the gradual flattening and hollowing of the Christian message itself.

Because the United States was founded during the transition between the transcendent and immanent social imaginaries, the nation has always had a complicated mixture of transcendent and immanent arguments for legal legitimacy. "The reigning notions of legitimacy in Britain and America" at the time of the American Revolution "were basically backward-looking" because both appealed to "an order based on law holding 'since time out of mind'" (Taylor 2007, 197). But this "older idea" of transcendent law "emerges from the American Revolution transformed into a full-fledged foundation in popular sovereignty" (Taylor 2007, 197). Thus, "we can say that the American Revolution started on the basis of one legitimacy idea" – within the transcendent frame – "and finished by engendering another very different one" – within an immanent frame. But the transition has never quite been completed. The MMO itself has always been justified in America based upon appeals to divine sanction and providence (Taylor 2007, 447-48).

Even in the United States, though, the MMO has led to increasing secularization over time – at least in public life – especially since the 1960s. Christian conservatives reacted to this secularization with new political and legal mobilization designed to defend the traditional

vestiges of transcendence. Reaction against the secularizing ethos of the MMO is responsible for many of the major legal battles Christian conservatives have fought in the wider culture wars, from school prayer, to abortion, to same-sex marriage and the contraception mandate (Brown 2002, 21-25; Hoover and den Dulk 2004, 18-19).

Within this movement to resist the perils of secularization, Christian conservatives have shown a somewhat schizophrenic attitude toward transcendent legal arguments. One the one hand, they have sometimes shown reluctance and even hostility toward transcendent, natural-law arguments, for a host of theological and practical reasons (see Covington 2009, 5; Black 2000, 148; Charles 2008, 111; Grabill 2006, Hittinger 2003). On the other hand, there has been a recent resurgence of interest in natural law among evangelical and other Christian conservative scholars (see Covington 2009; Budziszewski 2006; Charles 2008). More specifically, some Christian conservative legal scholars have issued ringing critiques of the legal positivist argument against judicial activism and strong natural-law defenses of the court (Arkes 2010; Hittinger 2003).

So a key question for the present is how far Christian conservatives want to take the legal backlash against secularization. Do Christian conservatives want to repudiate the immanent frame within which modern legal positivism prevails? This radical move could clear the way for a fresh encounter with the old encounter with a transcendent God, which has become increasingly more difficult. Or do Christian conservatives seek to stay within the immanent frame and present Christianity as just one more legitimate but non-authoritative story that is acceptable in a pluralist society? And why does it matter?

In the remainder of this paper, I intend to answer these questions using the legal arguments made by Christian conservative legal groups in the two Supreme Court cases that

have most captured the recent attention of the movement: the decision in *United States v. Windsor*[1] overturning the Defense of Marriage Act and the decision in *Burwell v. Hobby Lobby*,[2] upholding the right of religious business owners to be exempted from objectionable provisions of the Affordable Care Act.

II. Testing Christian Conservative Legal Principles: Sample and Methodology

Windsor and *Hobby Lobby* provide a great way to explore whether the Christian conservative movement is making a transcendent move that rejects liberal secularization and champions a return to divine higher law authority, or whether, as Taylor argues, the movement merely accepts the immanent frame and continues to make positivist arguments based on the Modern Moral Order. On the one hand, *Windsor* involves a secular challenge to the traditional view of marriage that is supported in part by the transcendent Christian doctrine that marriage is a religiously ordained union of a man and a woman. On the other hand, *Hobby Lobby* involves a federal regulation that attempts to force religious employers to violate their beliefs in a transcendent religious truth regarding the sanctity of unborn life. In each case, if Christian conservatives really want to attack liberal secularization and help the nation return to a more transcendent, religious footing, we would expect to see Christian conservative legal groups (A) embracing transcendent arguments – those that clearly support the authoritative moral principles they prefer – and (B) rejecting immanent arguments – those that support modern procedural norms such as individual autonomy, social agreement, and consequentialist logic.

In order to analyze a sample of the Christian conservative legal arguments about the issues, I chose a natural data source: the party and *amicus* briefs filed by Christian Conservative

[1] 570 U.S. ___ (2013).
[2] 573 U.S. ___ (2014).

groups in these cases. First, I generated two lists of briefs, one list of all the party or *amicus* briefs filed on behalf of the Bipartisan Legal Advisory Group (defending DOMA) in *Windsor* and another list of all the briefs filed on behalf of Hobby Lobby and Conestoga Wood (defending the religious exemptions). To do this, I used the American Bar Association's Supreme Court Preview web-site (http://www.americanbar.org/publications/preview_home.html), which contains links to the briefs filed in all Supreme Court cases going back to the 2003-2004 term. This resulted in a list of hundreds of briefs.

Second, to obtain a more manageable but still representative sample, I cross-referenced the two lists to identify all the persons and organizations that filed briefs in both cases and to eliminate all the persons and organizations that only filed briefs in one of the cases. I also eliminated all the briefs which were clearly centered on questions of standing and corporate personhood, which were unlikely to contain arguments central to the Christian conservative agenda. This resulted in the following list of 13 persons and organizations:

1. American Civil Rights Union
2. Beckett Fund for Religious Liberty
3. Beverly Lahaye Institute
4. Center for Constitutional Jurisprudence
5. Christian Legal Society
6. David Boyle
7. Eagle Forum Education & Legal Defense Fund, Inc.
8. Family Research Council
9. Foundation for Moral Law
10. Liberty, Life and Law Foundation
11. National Association of Evangelicals
12. Several Overlapping Groups of Law Professors and Legal Scholars
13. United States Conference of Catholic Bishops

Third, I eliminated from this list any persons, or organizations with a majority of leaders, who do not publically and officially (A) identify themselves as Christians, or (B) endorse

conservative positions on legal and political issues. While these may seem like vague criteria, it yielded clear and obviously valid results. For example, under the criteria of "Christian," there were a number of obviously Christian groups such as the "Christian Legal Society," "The National Association of Evangelicals" and the "United States Conference of Catholic Bishops" for whom there was no question of their religious identity. There were others whose religious commitments were not immediately obviously from their name, such as the "American Civil Rights Union," and the "Liberty, Life and Law Foundation." For these, I checked their web-sites and also searched independent web-sites such as Wikipedia, in order to confirm or deny their or their leaders' Christian identification and affiliation.

The criteria of "endorsement of conservative positions was a little trickier. Some, such as the U.S. Conference of Catholic Bishops, I eliminated because its positions are inconsistently conservative. Others, such as the groups of scholars and law professors, I eliminated because they did not officially represent any organization taking an ideological position. Still others, like the Beckett Fund, I left in even though their stated purpose is not to defend only conservative causes because of their national reputation as a leader in the movement for religious exemptions, which has now, for all intents and purposes, become a conservative issue.

This winnowing process resulted in the following list of eight organizations that I can confidently identify as Christian conservative legal groups by anyone's definition:

1. Beckett Fund for Religious Liberty
2. Beverly Lahaye Institute
3. Christian Legal Society
4. Eagle Forum Education & Legal Defense Fund, Inc.
5. Family Research Council
6. Foundation for Moral Law
7. Liberty, Life and Law Foundation

8. National Association of Evangelicals

I analyzed each of the sixteen briefs (one for each organization in Windsor and one for each organization in *Hobby Lobby*) in two waves. In the first wave, I coded the briefs for "transcendent" arguments or "immanent" arguments. I operationalized "transcendent" arguments as those that appealed to some source of authority that allegedly transcends human power or convention, whether scripture, religious doctrine, or even natural reason. I operationalized "immanent" arguments as those that appealed to some source of authority within human society, such as a democratic vote or a social consensus.

In the second wave, I sorted these previously identified "transcendent" and "immanent" arguments for various themes and sub-themes relevant to each category. This resulted in the following additional codes:

Transcendent Themes	**Immanent Themes**
Individual Conscience	Social Agreement
Higher Law	Democratic Process
Religious Doctrine	Liberal Social Order
	Social Consequences

III. City of God: Christian Conservatives' Transcendent Legal Logic

The briefs show some evidence of reliance on each of the transcendent themes identified above.

A. Appeals to Individual Conscience

Of course, appeals to conscience can be looked at as immanent or transcendent moves, depending on whether the conscience is seen as an expression of the authority of the autonomous

individual over against any higher authority (immanent) or as an expression of loyalty to a divine obligation higher than human community (transcendent). The conservative Christian briefs in these cases all illustrate the latter. A good example is provided in the briefs filed by the Liberty, Life and Law Foundation in both *Windsor* and *Hobby Lobby*. "Liberty of conscience," they argue, "is even broader than the free exercise of religion" because it represents a "duty to a moral power higher than the State" (2013, 12-13; 2014, 4-5, *quoting* McConnell 1990, 1491). Conscience has this authority not because it is the expression of a preference or opinion but rather because it is "vital . . . to the integrity of man's moral and spiritual nature." (ibid, *quoting United States v. Seeger*, 380 U.S. 163, 170 (1965)). As a result, Liberty, Life, and Law Foundation concludes, "nothing short of the self-preservation of the state should warrant its violation." (Ibid.).

The Christian Legal Society agrees in its *Windsor* brief, tracing the authority of conscience to a more explicitly transcendent source: God himself. "It is the duty of every man," they argue, "to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe." (2013, 7, *quoting* Madison (1785)). Simply put, "in the domain of conscience there is a moral power higher than the State." (Liberty, Life and Law Foundation, 2013, 11 and 2014, 20-21, *quoting Girouard v. United States*, 328 U.S. at 68).

B. Appeals to Higher Law

Beyond individual conscience, these Christian conservative groups appeal to a second transcendent source of legal authority – higher law rooted in the natural or divine order that transcends human convention. Natural rights constitute a very clear source of such higher law authority, especially those natural rights famously recognized by the founding generation. "[I]t is the political philosophy of the United States," says the Beckett Fund, "that governments are formed solely to protect a set of pre-existing rights that includes religious freedom." (2013, 37, *citing* the Declaration of Independence).

When discussing natural rights at the founding, the discussion inevitably shifts to the specific role of religion in anchoring the founders' belief in natural rights. The Foundation for Moral Law makes this point by clearly linking the natural rights mentioned in the Declaration to the hand of God himself. "The sacred rights of mankind," they remind us, "are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power." Such rights are natural, unalienable, and are defined by God . . . ." (2013, 14, *quoting* Hamilton 1775).

Liberty, Life and Law also makes the link clear between religion and natural rights. It is clearest in their *Windsor* brief, where they note that "America's history and judicial system is inescapably linked to religion." (2013, 22). They quote a number of illustrious constitutional framers for this proposition, including Benjamin Franklin: "[i]f a sparrow cannot fall to the ground without [God's] notice, is it probable that an empire can rise without His aid? We've been assured in the sacred writing that, 'Except the Lord build the house, they labor in vain that build it.'" (2013, 10, *quoting* Madison 1840, *quoting* Franklin). John Adams is also called into

service for the proposition that: ". . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." (2013, 22, quoting Adams 1854, 229). Even the deist Thomas Jefferson makes the list: "And can the liberties of a nation be thought secure when we have removed their only firm basis—a conviction in the minds of the people that these liberties are the gift of God?" (2013, 22 *quoting* Jefferson 1794, 237).
Of course, even Liberty, Life and Law concedes that "America's founders wisely declined to establish a national religion, leaving the people free from government intrusion." (2013, 21). But they nevertheless argue that Christianity has played such a prominent role that we can still fairly describe the United States as "a Christian nation." (ibid., *quoting Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892)).

Foundation for Moral Law goes further in its *Windsor* brief, pointing out that "[t]he Bible has been considered the authoritative source of morality and worldview for Western civilizations for nearly two millennia . . . including the time period in which the institutions of American law and government were established." (2013, 15). Thus, they conclude, "[t]o allow any alternative relationship to enjoy the status of marriage would not simply add another class of persons who can be 'married'—rather, it would undermine any basis for having a settled definition of marriage at all, especially the idea that marriage was "instituted by God" and the law of nature. (2013, 23).

Some of the groups extend this transcendent appeal to the religiously moral roots of American law beyond the founding to the current day, defending the proposition that religious morality and American law are inextricably linked. At a relatively mundane level, transcendent ethical standards continue to influence laws governing economic behavior. "Our moral tradition holds corporate owners and leaders morally responsible for the wrongdoing of their

corporations," notes the Christian Legal Society, "often impos[ing] criminal responsibility on individuals for corporate wrongdoing. (2014, 4, 39-40; see also Liberty, Life and Law, 2014, 27).

The appeal to transcendent moral principles goes well beyond economic regulation, however. Indeed, even marriage and family life are governed by religious higher-law standards, which must be applied by the state regardless of any contrary evidence that might be offered by social scientists and other experts. "While we certainly believe," concedes the National Association of Evangelicals, that "empirical evidence and sound science support our position [on marriage], fundamental social questions . . . cannot be decided on technical grounds. They are matters of the people's values, morals, [and] judgments . . . ." (2013, 3, *quoting* Washington v. Glucksberg, 521 U.S. 702, 710 (1997)). To those who would argue for a more objective, value-free, scientific approach, the National Association of Evangelicals answers that there simply "is no values-neutral position from which to weigh and judge what is best." (ibid., 12-13). This is why votes of people in various states rejecting same-sex marriage can be trusted – not because they represent a good positivist pedigree for the law, but because the people are drawing on "values, moral sense, history, [and] traditions," which constitute a higher authority that democracy or science. (ibid., 12-13).

C. Appeals to Religious Doctrines

A third, and much more bold, transcendent idea supported in the briefs is the idea that American law must correspond directly to specific religious doctrines. Most commonly, religious doctrine is used in the briefs to simply illustrate the nature of the religious objection to same-sex marriage or contraception coverage and to distinguish this religious objection from any motive of hatred or animus. The Beckett Fund's *Windsor* brief is most eloquent on this issue,

noting how "the institution of opposite-sex marriage is central to [the largest world religions'] moral teaching . . . . [resulting in] programs and teaching . . . frequently organized around the distinction between married couples and couples who are not married: benefits such as marriage retreats, marriage counseling, and the use of religious property." (2013, 7-8). "[T]hese longstanding practices" are not "prima facie evidence of anti-gay discrimination," as some courts have held, but are instead "expressions of longstanding moral worldviews." (ibid., 9-10).

In both cases, Christian conservative groups cite and discuss specific religious doctrines in order to demonstrate the transcendent demands their faith makes on their everyday conduct. A common doctrine discussed is the doctrine of religious vocation, which demands that Christians bring their private religious beliefs to bear on their public conduct in the workforce and the marketplace. According to the Family Research Council, "a person's participation in the economic activity of his or her community can involve just as full a part of exercising religion as solitary prayer, attending church, keeping the Sabbath, or seeking to bring one's faith to others." (2014, 2-3). Simply "[d]oing that which you are "called" to do in a faithful manner can be no less an expression of religion than overt prayer and for many is the more difficult, more persistent, and more complete means of exercising their religion." (ibid.; see also 9-13)

"A fundamental necessity" for Christians living out such a worldly vocation, elaborates the Christian Legal Society, is adherence to "a code of conduct that appears superficially unrelated to worship, prayer, or theology, and is often manifested by service in the public square." (2013, 7). As evidence of this code, Christian Legal Society cites scripture passages accepted by both Jews and Christians, including: Isaiah 58:5-7, "rejecting purely religious rituals and commanding believers to instead oppose and cure social injustice as a form of religious worship); Deuteronomy 15:11, commanding people to help the poor and needy. (2013, 7-10).

CLS also cites some passages accepted only by Christians, including: James 1:27, asserting that "[r]eligion that God our Father accepts as pure and fault less is this: to look after orphans and widows in their distress"; Matthew 25:34-40, describing how Jesus will judge people on the basis of whether they fed the hungry, housed the homeless, clothed the naked, cared for the sick, and visited those in prison; and Acts 6:2-4, setting up the responsibilities of the Deacons to "wait on tables" and serve those in need. (ibid.) CLS even cites a passage from the Koran, Surah 107:1-7, "admonishing [Muslims] to provide for the physical needs of the poor." (ibid.) Beyond these acts of charity, CLS's *Windsor* brief details other Christian doctrines requiring believers to take certain positions on social and political issues, including the promotion of racial justice, but also opposition to "certain changes regarding family life and structure." (ibid., 9-10).

Another common religious doctrine relied upon by Christian conservatives to illustrate the depth of their conscience claims is the prohibition on facilitation, material assistance, or material cooperation with evil. Eagle Forum's *Hobby Lobby* brief even quotes Pope Benedict XVI's insistence that Catholic pharmacists not "collaborate either directly or indirectly [with evil] by supplying products for the purpose of decisions that are clearly immoral such as, for example, abortion or euthanasia." (2014, 6-7).

The historical depth and widespread belief in these religious doctrines is ordinarily not used by Christian conservative groups as a substantive argument that the doctrines should be imported into law. Rather, Liberty, Life and Law Foundation argues, the doctrines should make courts and society in general cautious in deciding to abrogating them. "Same-sex intimacy is contrary to centuries of religious teaching," notes the Liberty, Life and Law Foundation, and the movement for same-sex marriage seeks to "'cast aside millennia of moral teaching' to convert it to a fundamental right." Such a decision, the group concludes, "should be the product of careful

and thoughtful judgment and not of a subtle and manipulative campaign of propaganda." (Liberty, Life and Law Foundation 2013, 3-4, quoting *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, J., concurring) and Duncan 1994, 415).

Even more aggressively, however, three of the Christian conservative groups are willing to take the next step and argue that specific religious doctrines outlawing abortion and same-sex unions are substantively true and should still form the basis of sound public policy. According to the National Association of Evangelicals' *Windsor* brief, "man-woman marriage [is] the foundation of our society, . . . 'the most important relation in life, . . . having more to do with the morals and civilization of a people than any other institution.'" (2013, 14-15, *quoting* Maynard v. Hill, 125 U.S. 190, 205 (1888); Murphy v. Ramsey, 114 U.S. 15, 44 (1885); Williams v. North Carolina, 317 U.S. 287, 303 (1942); and Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977).

In a much more direct fashion, the Foundation for Moral Law also goes back to the very beginning of the Bible to illustrate its view of the natural-rights logic behind Congress's preference for traditional marriage and gender norms:

> We are told in Genesis that "God created man in His own image, in the image of God He created him; male and female He created them. . . . For this reason a man shall leave his father and his mother, and be joined to his wife; and they shall become one flesh." Genesis 1:27, 2:24 (King James Version). The law of the Old Testament enforced this distinction between the sexes by stating that "[i]f a man lies with a male as he lies with a woman, both of them have committed an abomination." Leviticus 20:13 (KJV). At creation, therefore, the sexes were established as "male and female" and "[f]or this reason," marriage was defined at its inception as a union between a man and his wife. Genesis 2:18-25. Only the male-female marriage is inherent in the same created order that gives us our legal equality before the law, as recognized in the Declaration of Independence. (2013, 14-15).

Finally, Liberty, Life and Law Foundation also affirms and proclaims the substantive Christian doctrines of male-female gender and male-female marriage, first in its *Windsor* brief:

> Christianity teaches that God affirmed sexuality as a fundamental element of the created order when He created male and female in His image (Genesis 1:26-27, 2:7, 2:18-23). He ordained their union in the covenant of marriage, to bear children and instruct them in His law (Genesis 2:24-25; Deuteronomy 4:9-10). New Testament Scripture draws an analogy between husband-wife and Jesus Christ 's relationship to His church (Ephesians 5:31-32). . . . [E]rasure of the male-female distinction is tantamount to a pantheistic worldview that blurs the distinction between God the Creator and His creation, and homosexuality is not a minor aberration. As one theologian expressed it:
>
> > Though presented in the righteous robes of civic justice, homosexuality represents a complete distortion of creation's sexual structures. We cannot understand the radical implications of homosexuality's acceptance until we realize that homosexuality turns the blueprint for life inside out and upside down.

(2013, 23-24, *quoting* Jones 2006, 27).

Liberty, Life and Law takes a similarly essentialist view of women, drawn directly from scripture, in its *Hobby Lobby* brief, where the group argues that the government's asserted interests in "gender equality" and "public health" are not compelling because they require "women [to] deny what makes them unique as women (their ability to conceive and bear children), in order to be treated 'equally' with (or by) men." (2014, 29-30, *quoting* Linton 1993, 46). "Genuine equality between the sexes will be reached," asserts Liberty, Life and Law, "on that day when women can affirm what makes them unique as women and still be treated fairly by the law and society." (ibid.).

In these passages, the National Association of Evangelicals, the Foundation for Moral Law, and the Liberty, Life and Law Foundation all take the next logical step from speaking about transcendent religious norms as evidence of widespread and deeply held beliefs to making the case for these transcendent norms as a – if not the – legitimate basis of American law. But these

are three Christian conservative groups out of eight who filed briefs in both the *Windsor* and *Hobby Lobby* cases. The other six were unwilling to make a direct appeal to transcendent religious authority because of their conscious or unconscious acceptance of the conventional wisdom of the Modern Moral Order's immanent frame – a frame that is shared in part, as we will see, by even these three seemingly stalwart defenders of the transcendent view.

IV. City of Man: Christian Conservatives' Immanent Legal Logic

The Christian conservative briefs filed in *Windsor* and *Hobby Lobby* overwhelmingly prefer jurisprudential arguments that appeal to authorities immanent within the modern liberal tradition.

A. Appeals to Social Agreement

Rather than arguing that religious doctrines, scriptural commands, or even natural-law principles arrived at through reason alone are the proper basis of American marriage and health care law, these briefs argue that social agreement is a necessary and sufficient basis for law. One type of social agreement favored by many of the briefs is historical consensus. The *Hobby Lobby* briefs appeal to a particular longstanding historical consensus regarding granting exemptions to those whose consciences forbid them from certain practices. "[C]onscientious scruples against taking human life have gotten the highest protection throughout our history," the Christian Legal Society tells us, including exemptions from military service, assistance with suicide, participation in executions, as well as participation in abortion. (2014, 37-38; see also Liberty, Life and Law 2014, 6-7, describing the particular exemptions granted for those not wanting to participate in abortion).

Many of the *Windsor* briefs also appeal to a longstanding historical consensus disfavoring homosexuality. Foundation for Moral Law traces "[p]rohibitions against homosexual conduct . . . back to ancient times," citing "[t]he Bible, . . . which has influenced moral values for Judaism, Christianity, Islam, and other religions," the Roman's "Theodosian Code (IX.7.6) and . . . Justinian Code (IX.9.31)" and . . . St. Thomas Aquinas . . . ." (2013, 15-16). They then follow these historical condemnations of homosexuality into "English common law," citing Edward Coke, and into English statutory law under Henry VIII before tracing the historical consensus right up to William Blackstone whose commentary on English law was once "the manual of almost every student of law in the United States." (ibid., 16-18). The same brief completes the picture of universal condemnation of homosexuality by describing how this "crime against nature was prohibited in many of the colonial law codes [and then outlawed] either by statute or by common law in all thirteen [original] states." (ibid., 18-19). "When the Fourteenth Amendment was adopted," they tell us, "homosexual conduct was prohibited in 32 of 37 states, and during the twentieth century it was prohibited in all states until 1961." (ibid.)

Citing some of these same numbers of states in the young nation that outlawed homosexuality, the Eagle Forum takes the next step, remarking how it is "simply not conceivable that those states understood Equal Protection to require the states and the Federal Government to recognize same-sex marriage . . . ." (2013, 26-27). Quite the contrary, say many of the *Windsor* briefs, the strongest historical consensus regarding sexual and marital union is the one favoring opposite-sex pairings. Indeed "traditional, opposite-sex" unions are "a social institution deeply rooted in this Nation's history, culture, laws, and diverse religions." (National Association of Evangelicals 2013, 8, *quoting* Murphy v. Ramsey, 114 U.S. 15, 44 (1885); see also 10, 15).

A more specific type of historical consensus cited by the briefs is the consensus among legislatures, federal and state. For example, the Beckett Fund's *Hobby Lobby* brief cites "congressional debates . . . [that] displayed an undisputed public understanding that the language in RFRA [the Religious Freedom Restoration Act, at issue in *Hobby Lobby*) protected for-profit corporations and their owners." (2014, 17). The Beckett Fund also cites state legislative consensus in its *Windsor* brief: "Every state legislature to adopt same-sex marriage," the brief notes, "has included stronger conscience protections than the state and federal court decisions that invalidated DOMA . . . . In the sixteen years since DOMA was enacted, six states and the District of Columbia have adopted same-sex marriage laws through the democratic process. All of these laws have included conscience protections." (2013, 5; see also Life, Liberty, and Law 2014, 7, saying much the same about the state legislative consensus on religious exemptions from health care laws).

Beyond the consensus of federal and state legislators, the briefs also appeal to agreement or disagreement among ordinary citizens or litigants as a reason for adopting or rejecting new laws. Paradoxically, given their strong natural-law leanings, even Liberty, Life and Law and Foundation for Moral Law rely on an appeal to contemporary social agreement about traditional sexual morality to make their case that it should still be outlawed. "Citizens all over the country," Liberty, Life and Law tells the court, "have initiated legal action to halt the trend toward enhanced gay rights. Proposition 8 is merely one of these efforts. Over half of the states have amended their constitutions to preserve marriage. Colorado and Ohio voters passed initiatives to ban special protections for gays and lesbians." (2013, 3).

Why does this trend of popular opposition to homosexuality matter? At the least, argues Liberty, Life and Law, "[t]he very fact that such initiatives have been proposed and passed is evidence that many Americans are deeply troubled" and that the courts should be wary of upholding same-sex marriage (2013, 19). Going further, Foundation for Moral Law concludes that "the passage of 41 state 'defense of marriage' acts (either as statutes or as state constitutional amendments ratified overwhelmingly by the voters of the various states), clearly demonstrate that homosexual acts meet with widespread disapproval in our laws and in our social values. (2013, 20-21).

The same is true of disagreement regarding abortion, argues Life, Liberty and Law's *Hobby Lobby* brief: "There is no . . . established policy favoring abortion rights—instead, there is intense division and passionate emotion as the debate rages on." (2014, 19). "Concerned citizens across the country," they tell the court, "have enacted state laws to regulate" abortion, including "informed consent, parental notice, waiting periods, and other statutory limitations. . . ." Just as with the dissensus regarding gay rights, the "the very fact that such restrictions have been proposed and passed is evidence that Americans are profoundly troubled and deeply divided" and that legislative action imposing one solution on reproductive issues is therefore illegitimate. (2014, 19-20). The very same logic is employed by the National Association of Evangelicals in its *Windsor* brief. It argues that the passage of DOMA reflected "a legitimate conflict that divides reasonable people of good will. From their kitchen tables to the halls of Congress, Americans are discussing, debating, compromising, and deciding how to address the needs and claims of same-sex couples." (2013, 18). Why does such lack of agreement matter? Because "as long as Congress's choice remains debatable, as it surely is here," the Court should be cautious and reluctance to impose its will (ibid.)

Another form of social agreement or disagreement that seems to matter to Christian conservative legal organizations is agreement or disagreement by scholarly or scientific experts. They are at particular pains to appeal to such expertise on issues where they have been most criticized by the scientific community, such as whether the contraception covered by the ACA are abortifacients and whether there is any evidence that homosexuality is immutable. On the contraception issue, Eagle Forum appeals to the experts at the Department of Health and Human Services, who concluded that a "fertilization-based definition" of when pregnancy begins "has a stronger historical, legal, and scientific foundation." (2014, 13).

On the issue of homosexuality's mutability, the Family Research Council relies on a Maryland Court of Appeals finding that "[b]ased on the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group . . . ." (2013, 26). They also rely on a Washington Supreme Court ruling noting that the plaintiffs had failed to cite "any studies in support of the conclusion that homosexuality is an immutable characteristic." (ibid.).

These appeals to social consensus make little sense in a worldview governed by objective, transcendent moral and legal norms. After all, such transcendent norms would exist and be binding whether or not people agreed about them, just as the sun shines whether one's shades or open or shut. According to a transcendent perspective, reality has a mind-independent existence. Social agreement or disagreement matter crucially, though, if one doubts or denies the validity of mind-independent reality. If I am unsure it is daytime and unable to open the shades to find out, my only recourse is to check with others in the house to see what they think. In

short, immanent mind-dependent agreement about the nature of reality is a replacement for transcendent, mind-independent knowledge of reality.

B. Appeals to Democratic Process

A focus on social agreement leads naturally to fixation with a proper method for legitimizing or delegitimizing that agreement. In the immanent frame of the modern liberal worldview, the greatest legitimizer of social agreement is the democratic process. There is strong support for the democratic process in the Christian conservative briefs – specifically as an alternative to the judicial process.

One of the main reasons Christian conservative groups appeal to the democratic process in these cases, of course, is that this process has been largely favorable to their interests. In the *Windsor* case, they are defending the constitutionality of the Defense of Marriage Act that enshrined the traditional view of marriage at the federal level, as well as indirectly defending a number of state laws that have embraced the same view. In the *Hobby Lobby* case, they are arguing for a strict interpretation of the Religious Freedom Restoration Act that holds the government to a very high standard when infringing on the exercise of religious freedom. Accordingly, one of the common claims about the democratic process made in the briefs is that it is a rational process to arrive at correct conclusions about contentious social issues. (Beckett Fund 2013, 28-33; Family Research Council 2013, 15-17).

But this general belief in the rationality of democratic action quickly builds into a full-throated defense of majoritarian democratic actions as opposed to counter-majoritarian judicial institutions. "[C]ourts must be careful," the Christian Legal Society warns in its *Windsor* brief,

"about identifying new suspect classes because such recognition takes important decisions out of the normal "democratic processes." (2013, 23). The Beckett Fund provides the most sustained and detailed explanation for this caution: judicial action risks make the discussion of same-sex marriage "a frozen conflict—a political debate without hope of political remedy." (2013, 33). This is what happened in the abortion conflict, Beckett Fund claims: "when Roe v. Wade was decided in 1973, 'legislatures all over the United States were moving on [abortion],' and '[t]he law was in a state of flux.' . . . . This Court's decision to strike down nearly all existing abortion laws on a single day created 'a perfect rallying point' for the pro-life cause, . . . and 40 years later Roe remains at the epicenter of the public conflict over abortion." (ibid., quoting Liptak 2009). Similarly in the same-sex marriage debate, "Striking down DOMA . . . would result in the same kind of self-perpetuating conflict that emerged after Roe. [It] will throw the marriage laws of all fifty states into doubt [and] . . . reduce the political discussion to two sides shouting at each other endlessly with no constructive result—the political equivalent of trench warfare." (ibid., 34). "The better path," they argue, "is to allow the democratic process time to work." (ibid., 5).

In contrast to the judiciary, the Beckett Fund argues, legislatures are more likely to arrive at "workable compromises regarding religious liberty." (ibid., 35-36). "Although many have argued in the press or elsewhere that the debate over same-sex marriage is a winner-take-all battle, there is potential middle ground that . . . requires detailed exploration and balancing of all of the societal interests at stake," which is "a job that legislatures can undertake far more easily than the judiciary." (Beckett Fund for Religious Liberty 2012a, 35-36, citing Laycock 2008, 196).

A final reason legislative action is more legitimate, Beckett Fund says, is that it allows for "reconsideration and fine-tuning" that would be all but impossible in the courts – even reconsideration and fine-tuning that might allow for more same-sex marriages. "[V]oters are free to revisit their decisions. That is what happened in Maine: in 2009, voters rejected a same-sex marriage law in a statewide referendum, but in 2012, they adopted a same-sex marriage law—including religious exemptions—in a second statewide referendum." Beckett Fund for Religious Liberty 2012a, 36-37, citing CNN 2009 and New York Times 2012).

This preference for legislative over judicial action is echoed in other briefs, including Eagle Forum (2103, 10-11) and the National Association of Evangelicals, arguing that the democratic process should be accorded "its proper respect and place" because it "allows all voices in this historic debate to be fairly heard." (2013, 3-4).

Of course, the flipside of this argument that legislative policy making is more legitimate than judicial policy making is the old argument about the famous "counter-majoritarian difficulty." Beckett Fund does not wholeheartedly embrace this argument; instead they argue that the perception of undemocratic judicial action would delegitimize the resulting precedent. The existing societal conflict over same-sex marriage "would be exacerbated," they claim, "by the inevitable perception that overturning DOMA and Proposition 8 was anti-democratic." This would "be seen, rightly or wrongly, as the Court overruling both Congress and the voters . . . . [a]nd it would . . . send the message that Americans and their representatives are not competent to decide thorny issues. (Beckett Fund for Religious Liberty 2013, 34-35; see also Eagle Forum 2013, 25).

C. Appeals to Liberal Social Order

A third immanent idea is implicit in the preference for social agreement and the preference for democratic action. Social agreement – especially the agreement legitimized through the democratic process – is prized because it helps to secure an overarching liberal social order comprised of several different elements, including *neutrality, pluralism,* and *individual autonomy.*

A liberal social order rests on the conviction that legal and political system should separate law and morality by maintaining *neutrality* toward competing claims. This means, first of all, that the state should not try to impose a homogenous view on society. So intent are Christian conservative groups in upholding this standard of neutrality that they actually quote a number of Supreme Court cases that were decided against them, or at least against the positions they usually uphold. For example, Christian Legal Society's *Windsor* brief and Eagle Forum's *Hobby Lobby* brief both quote the famous passage from *West Virginia State Board of Education v. Barnette* (1943): "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" (319 U.S. at 642, quoted in Christian Legal Society 2013, 33-34 and Eagle Forum 2014, 10).

Liberty Life and Law quotes another case to buttress its embrace of official neutrality: "When the D.C. Circuit [previously] addressed the question 'of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters' it concluded that '[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also forbids government from

dictating the answers.'" (Liberty, Life and Law Foundation 2013, 13, *quoting* Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 24 (D.C. 1987)).

Most remarkably, Liberty, Life, and Law Foundation quotes *Planned Parenthood v. Casey* (1992) to make a similar point about the government's obligation to remain neutral: the obligation of the court, they say, "'is to define the liberty of all, not to mandate [their] own moral code.' . . . If this Court bypasses the states and the people and proclaims a constitutional right to same-sex marriage, it will be destroying the liberty of many Americans by mandating a moral code contrary to their deepest convictions." (505 U.S. 850, quoted in 2013, 37). This is particularly stunning because it was precisely this language from *Casey* that was once considered by some influential Christian conservatives as so incendiary that it signaled "the end of democracy" (see First Things 1996).

Of course, one upshot of these claims to official neutrality is to take advantage of ordinary liberal logic in order to protect the religious ideas and practices of an increasingly embattled Christian conservative minority. This is the reason that, in the *Hobby Lobby* briefs, they often cite Free Exercise cases holding that courts may not inquire into the substantive correctness of religious beliefs but only into whether they are sincerely held. Consider, for example, Beckett Fund's long list of citations to such cases in its defense of Hobby Lobby's owners' claim that their religion forbids them from even being part of an insurance system that covers objectionable contraception:

> At bottom, the government insinuates that Respondents simply misapprehend their own beliefs because their employees' use of the objectionable items cannot be attributed to Respondents "in any meaningful sense." . . . But that is not how Respondents see it: they sincerely believe that providing the coverage makes them morally complicit. And that belief is not open to question here. See, e.g., Smith., 494 U.S. at 887 ("[r]epeatedly * * * we have

> warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim"); Lee, 455 U.S. at 256-57 ("[ijt is not within 'the judicial function and judicial competence' * * * to determine whether appellee or the Government has the proper interpretation of the Amish faith"); Thomas, 450 U.S. at 715-16 (because Jehovah's Witness "drew a line" against participating in tank manufacturing, "it is not for us to say that the line he drew was an unreasonable one"). It is not for the government to insist that Respondents' faith should have reached a conclusion more convenient for the government's regulatory goals.

(2014, 41-42).

The Christian Legal Society does much the same thing in its *Windsor* brief. "'When the triers of fact undertake' to determine the truth of religious doctrines or beliefs," CLS claims, "'they enter a forbidden domain.' 322 U.S. at 87. Protection of religious beliefs does not 'turn on a judicial perception of the particular belief or practice in question.' Thomas v. Review Board, 450 U.S. 707, 714 (1981). Quite simply, '[c]ourts are not arbiters of scriptural interpretation.' Id. at 716. At bottom, '[p]articularly in this sensitive area, it is not within the judicial function and judicial competence to inquire' into religious doctrine. Id. See Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 833-834 (1989)." (2013, 16).

The use of appeals to neutrality to stave off impending discrimination against Christianity comes out most clearly in the *Hobby Lobby* briefs filed by Foundation for Moral Law and Liberty, Life and Law. "a 'regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion," argues Foundation for Moral Law. (2014, 28, *quoting* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)). Even though it appears "neutral on its face," the Affordable Care Act actually violates the necessary liberal neutrality norm because it forces Hobby Lobby to "either (a) violate their religious convictions by providing contraception/abortifacients, or (b) give up . . . the right to do business as a corporation . . . ." (ibid., 28-29).

Life, Liberty and Law's *Hobby Lobby* brief makes the discriminatory implications of this more clear. "[A]s protection expands to more places and people," they note, "so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants." (2014, 12). Later in the same brief, the same fear is revealed more starkly: "There is discrimination lurking in the shadows of these cases—not discrimination against women, but the government's blatant discrimination against religious business owners." (ibid., 26). "Religious liberty is particularly susceptible to infringement," they claim, because "[w]ith respect to the great post-modern concerns of sexuality, race, and gender, the advocates of social change are anything but indifferent toward the teachings of traditional religion." (ibid., *quoting* McConnell 1993, 187). This fear of current and future discrimination against Christians who take their faith seriously makes the appeal to liberal neutrality more attractive than it otherwise would be, even for a group that seems unafraid in other contexts to embrace transcendent moral principles regardless of the consequences.

The liberal preference for *pluralism* is the natural ground and consequence of government neutrality. If there is no external authority, whether the transcendent authority of God or objective reasoning – or at least if an appeal to that transcendent authority is seen as inappropriate – then law and public policy can only result from a power struggle between various groups with diverse points of view.

"Which vision [of marriage] should prevail in the federal government and in the various States," says the National Association of Evangelicals, is not a matter of objective truth or of settled natural law, but it "is a matter of spirited and legitimate debate among scholars, lawyers, judges, legislators, and of course the People. We and other religious communions are a necessary

part of that democratic discussion. . . . We have just as much right as anyone else to have our views considered by democratic decision makers." (2014, 2-3). NAE is not claiming here any kind of higher authority for its claims than that it is one more interest group with its own subjective claims existing alongside countless others.

Indeed, this argument is made by the NAE not only in the *Hobby Lobby* case where it is defending religious conscience protection – an issue much more susceptible to the balancing of various societal interests but also in the *Windsor* case where its underlying theological position rests on a more definitive and absolute claim to truth. Even here, they merely seek to be treated like everyone else: "[N]o less than members of any other group," religious groups "enjoy the full measure of protection afforded speech, association, and political activity generally." (2013, 20, *quoting* McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring)). So much does the NAE want to be lumped in with other groups that they even draw analogies between anti-religious judicial holdings and the political liabilities suffered by various minority groups traditionally shut out of the process: "Increased scrutiny [of religious motives for legislation] could be regarded as a 'religious gerrymander,'. . . . American citizenship would be damaged if votes cast by the religious — or by their representatives when influenced by religious values — were evaluated more critically by courts than other votes. In such situations, invalidating votes post hoc poses no less a burden on the franchise than barriers at a polling station." (ibid., 20-21, *quoting* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (Kennedy, J.)).

Turning the tables on its progressive opponents, however, Liberty, Life and Law goes further. They argue that the real threat to modern pluralism is not Christian conservatives

seeking to impose their theological views on the rest of society. Instead, the real threat comes from supporters of reproductive choice who seek to drive traditional viewpoints out of the marketplace of ideas. Secular progressives, they argue, are: "squeezing [religious views] out of full participation in civic life" (2014, 27); it is they are "employ[ing] the strong arm of the state to . . . ruthlessly suppress[]" traditional Christian morality (2014, 17-18, *quoting* McConnell 1993, 186-88); they are "banning people of faith from full participation in society" (ibid., 18, quoting Callaghan 2006, 573); and they are "crush[ing] them with debilitating legal penalties" (ibid., 33).

To reinforce the immanent logic of this appeal to pluralism, Liberty, Life and Law concedes that this kind of society requires a renunciation of the right of any transcendent moral or political norms, except those of toleration and accommodation: "The price of freedom of religion or of speech or of the press," they argue, "is that we must put up with, and even pay for, a good deal of rubbish." (Liberty, Life and Law 2014, 33, *quoting* United States v. Ballard, 322 U.S. 78, 95 (1944)). The implication left is that the Christian view of marriage, procreation, and abortion must be protected by a pluralistic society just like other "rubbish." No more fitting words could be uttered to demonstrate that Christian conservatives have embraced a purely procedural view that assumes no one has a monopoly on truth.

Beneath the liberal ideals of neutrality and pluralism is a deeper modern belief in the overriding *autonomy* of the individual. This is perhaps where the contrast between the ancient transcendent worldview and the modern immanent worldview becomes clearest: where the transcendent view grounds law squarely in the authority of objective truths to which individuals

are bound to submit, the immanent view grounds law in the sovereign authority of the individuals composing the society that creates the law in the first place.

The only absolute in a society based on individual autonomy is that society or the state may not impose its moral judgments on the individual. Drawing a historical analogy to another situation where some states sought to impose their views on others, Eagle Forum claims that, "[n]o less than the pro-slavery advocates of the 1850s, the same-sex marriage advocates of our time seek to impose their views not only on the Federal Government but also on every state in the Union." (2013, 13; see also 21). The National Association of Evangelicals agrees, turning the tables on those who claim that Christians are seeking to impose their theological views. "The employers in these cases," they argue, "do not seek to force their employees to live by the employers' moral and religious commitments . . . . [by barring] their employees from purchasing abortifacient drugs and devices using their own funds or other resources. The government . . . seek[s] to legally force the employers to conform to its moral values [by] . . . mak[ing] the employers pay, . . . for . . . a prepaid right to drugs and devices that the employers believe act as abortifacients." (2014, 5-6).

The lesson is clear if concise: "In this 'clash of autonomies," Christian conservatives are not seeking to invoke a transcendent, objective moral truth in the debate over marriage or abortion; they are simply seeking "equal protection of their 'right to choose.'" (Liberty, Life and Law Foundation 2014, 18, *quoting* Miller 2006, 344).

D. Appeals to Social Consequences

The final upshot of the entire immanent legal worldview focuses on the type of evidence considered persuasive within a liberal social order. Whereas a transcendent worldview sees the role of logic and reason as reflecting and elaborating objective truths that are the real authorities guiding human action, the immanent worldview sees logic and reason as operating according to a utilitarian calculus: uncovering evidence of the positive or negative social consequences of policies being debated.

The fiercest battle to demonstrate the social consequences of a policy are in the *Windsor* briefs where Christian conservative groups return time and again to the positive effects of traditional marriages on families in general and children in particular. The Beverly LaHaye Institute is particularly insistent on this point, pointing to "studies cited by American College of Pediatricians demonstrating that children 'benefit from the unique parenting contributions of both men and women.'" (2013, 7). They go on to defend the research cited by the American College of Pediatrics against many social scientific criticisms leveled at it by amici on the other side, concluding that "it strongly supports Congress's commonsense view that opposite-sex marriage provides the optimal environment in which to raise children." (ibid., 32-33).

Eagle Forum takes a different approach, pointing to state presumptions that the husband of the mother at the time of birth is the father of the child. "[S]ociety has fashioned" these presumptions, they argue, "to maximize children's chances of being raised in a nuclear family." (2013, 16-17). This commonly asserted "interest in husband-wife families that raise their biological children" is preferred, they claim because it is "the most stable basis for propagating society." (ibid., 28).

The Family Research Council agrees. Citing a number of federal and state precedents, they conclude that "[a]s an institution, marriage exists for the primary purpose of" providing "a stable legal and societal framework in which children are procreated and raised, and providing the benefits of dual gender parenting." (2013, 21-22). Because same-sex couples cannot procreate, or provide dual-gender parenting, Family Research Council continues, "they are not similarly situated to opposite-sex couples." (ibid.). The National Association of Evangelicals makes much the same point about the positive social benefits of traditional marriage on children. "Long experience, including our own over many decades," they say, "has taught that children thrive best when cared for at home by their biological parents . . . ." (2013, 8-9).

Foundation for Moral Law then traces this focus on the positive benefits of traditional marriage right into the motivations for the Defense of Marriage Act. "Congress asked," they note, "why society recognizes the institution of marriage in the first place." (2013, 23). "The answer," according to a Congressional report issued during the passage of DOMA, is that "[a]t bottom, civil society has . . . a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children. . . . That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship." (ibid., 23-24). They then discuss "two more purposes to marriage in addition to childrearing and generational continuity." (ibid. 25). These are "preventing the promiscuous intercourse of the sexes," and "promoting domestic felicity," or "the happiness and pleasure to be found" in a marriage. (ibid.). Finally, "As further evidence of a rational basis" for civil marriage law, Foundation for Moral Law

"invites the Courts attention to" a study "surveying numerous cultures, ancient and modern," and concluding "that the most successful societies were those which confined sexual urges to monogamous marriage." (ibid, 25-26).

These are remarkable statements for an organization which, just a few pages back in the same brief, was extolling the Biblical basis of marriage and traditional gender role as the foundation for western civilization. Evidently, the fact that God commanded men and women to come together in marriage and even made marriage the very image of his own union with his Church is not a sufficient basis for civil laws honoring traditional marriage. Instead, the conclusion seems to be, civil laws honoring marriage are only legitimate if they have some other desirable social consequence – producing well-adjusted children, discouraging promiscuity, and even producing greater happiness levels.

The flipside of all this focus on positive social consequences is a concomitant focus on the negative social consequences of the policies conservative Christian groups disfavor. Again, this happens a lot in the *Windsor* briefs, this time to show that same-sex marriages have negative effects on families and children. The Beverly LaHaye Institute, in particular, cites a huge laundry list of findings in one study purporting to show all of the following statistically significant increased risk factors in children parented by gay or lesbian parents: Higher use of "welfare" and other "public assistance," fewer people "employed full-time" and more people "unemployed," lower rates of voting in a "presidential election," higher numbers "[r]ecently or currently in therapy," higher numbers of "affair[s] while married" or "cohabiting," higher reports of "sexually transmitted infection" and being "touched sexually by parent" or another "adult," higher percentage reporting that they were "forced to have sex against will," lower reported rates

of "physical health," higher reports of "depression," lower "[l]evel of household income," higher reports of troubled relationships, higher "[f]requency of marijuana use," "smoking," and "watching TV," higher "[f]requency of having been arrested," or having "pled guilty to [a] non-minor offense," higher "[n]umber of . . . sex partners," increased thoughts "about suicide," lower levels of perceived "[c]loseness to biological mother," and on and on. (2014, 15-19).

Even some of the *Hobby Lobby* briefs wade into consequentialist reasoning by focusing on the negative social consequences of the increased availability of contraception and abortion. According to the Liberty, Life and Law Foundation, the negative social costs of requiring religious objectors, including doctors and others, to comply with laws they disagree with on religious grounds include "a corrosive effect upon the dedication and zeal with which [a doctor] ministers to patients, . . . a corrosive impact on American society" in general. (2014, 6). These negative effects also include, "harming numerous third parties and restricting access to goods and services," the potential for "cutting the work force and discontinuing insurance programs altogether—resulting in a loss of jobs and benefits," (ibid., 26), and even a crumbing of "the constitutional foundation" in a way that means "all Americans will suffer" because "[o]verly aggressive assertion of particular rights can erode protection for other liberties." (ibid., 32).

The Beverly LaHaye Institute also touts the negative results of increased contraception coverage, even for the goals that Congress had in mind when it passed this part of the ACA: lowering unintended pregnancies. "[W]hile for the individual, a contraceptive drug or device may prevent a pregnancy," the brief argues, "this result cannot be extrapolated to a societal scale." (2014, 11). In fact, "[i]ncreasing access to contraceptives . . . .changes behaviors and expectations across society." (ibid.) For example, "while access to contraception decreases teen

pregnancy in the short run, it increases teen pregnancy in the long run by encouraging sexual activity." (ibid.). In the case of emergency contraceptives, "[n]ot only have [they] failed to lower teen pregnancy rates according to every relevant study in myriad countries, but they are disturbingly and regularly associated with increases in teen pregnancy and abortion rates" because they make "teens . . . more careless about birth control and more likely to have . . . unprotected sex." (ibid., 11-12). More to the point of the ACA, the Beverly Lahaye Institute contends, "there is substantial evidence that widespread and lengthy use of contraceptives by women has resulted and will result in significant harm to their health." (ibid., 20-21).

No utilitarian could offer a more complete consequentialist case for traditional civil marriage laws and lower access to contraception and abortion than these conservative Christian organizations have done here. As we saw in the previous section, at least some of these organizations profess a sincere belief that law can only be validated and legitimated by transcendent norms and principles operating far above the level of mundane social science statistics and findings. It is hard to see why some of the same organizations are now going to such great lengths to demonstrate that their position on these controversial issues are buttressed as well by the positive or negative practical effects that might flow either way. It could be that they are simply being good legal strategists – hoping that if one sort of argument fails to convince the court, or at least convince the organization's followers, then another sort of argument will succeed. Or it may be, as I will explore in the concluding section, that this focus on social consequences betrays a deeper contradiction in the movement's worldview.

V. A World Well Won or a World Well Lost? The Promises and Perils of the Modern Moral Order

Why does it matter so much that Christian conservative legal activists appear to be relying so much on what Charles Taylor calls "the modern moral order," with its purely "immanent frame" of reference? There are three answers, one which might be a problem for the movement itself and two others which are problems for us all.

A. The Problem for the Movement: Worldview Incoherence

When used by Christian conservatives, immanent legal arguments create an interesting jurisprudential problem. The problem could even rise to the level of a serious contradiction when seen in the context of the overall social and political aims of the movement. Here is the nub of the problem: immanent arguments assume that properly enacted legal-institutional *procedures* are sufficient to create legal legitimacy quite apart from the *substantive* content of the laws that result from those procedures; but it is the very *substance* of laws upholding abortion, same-sex marriage, and other practices that Christian conservatives hold to be illegitimate and even sinful. The Christian conservative preference for immanent legal arguments thus contradicts a major aim of the movement: to defend and advance objective moral norms against the onslaught of modern and postmodern moral relativism (see, e.g., Beckwith & Koukl 1998; Colson and Neuhaus 1995; Hoover and den Dulk 2004, 10).

Natural-law arguments would enable Christian conservatives to make much stronger arguments in favor of objective moral norms by grounding the legitimacy of traditional moral laws in transcendent truths that can be accessed through reason but that transcend the vagaries of subjective opinion. Put another way, given their overall goals, the Christian conservative should

use substantive arguments about the proper content of law to rationally persuade people about the objective correctness of traditional moral laws and the objective *in*correctness of more progressive laws. But instead, as we have seen Christian conservatives tend to argue that courts should take an *agnostic* attitude toward the substantive content of the law and instead judge law's correctness based upon whether it has been subjectively agreed upon using the proper democratic procedures and according to the proper liberal norms of neutrality, pluralism, autonomy and utilitarianism.

The most serious problem for Christian conservatives is that reliance on immanent legal logic could in the long run wind up committing its adherents to an extreme version of legal formalism – one which requires judges to uphold any properly enacted law, no matter how substantively immoral or evil. Even outside a natural law approach, the dissonance between a judge's moral conscience and the strict requirements of law can still create a serious conflict, which Cover calls the "moral-formal dilemma" (Cover 1975).

This dilemma was perhaps most infamously raised in the case of Nazi jurists charged with interpreting and applying Nazi laws, and in the ensuing debate between Hart and Fuller (Hart 1958; Fuller 1958). In the formalistic view of law, Cover notes, there are four options for a judge facing this dilemma: (1) "he may apply the law against his conscience"; (2) "he may apply conscience and be faithless to the law"; (3) "he may resign"; or (4) "he may cheat" by stating that "the law is not what he believes it to be" (Cover 1975, 6).

As others have pointed out, positivist critics of court decisions overturning traditional moral laws seem to have committed themselves to option 1 (Fleming 2001b, 207-8; Berger 1997, 18). Indeed, both George (2001, 141-3) and Justice Scalia (1996, 87) are quite open about this.

For example, despite Scalia's personal moral conviction that it is morally evil, he concedes that "if the people want abortion, the state should permit it" (ibid.). Robert George agrees:

> While I think that pro-abortion policies, whether put in place legislatively or by judicial action, are unjust to their unborn victims, I am not in the least troubled by the proposal to settle the question of abortion via the processes of representative democracy, even in states like New York that are likely to resolve the question in what I judge to be the wrong direction (2001, 201).

Many of the Christian conservative legal briefs surveyed above also seem to agree, arguing that society should tolerate and neutrally accept the outcome of the democratic power struggle, even if it sometimes allows for practices like same-sex marriage and abortion that they would otherwise find substantively immoral. Indeed, all of the briefs surveyed above go to great lengths explaining the agonizing moral conundrums that the HHS mandate has foisted upon them and that they believe the legalization of same-sex marriage will eventually foist upon them. Remember that, according to at least three of these organizations (the Foundation for Moral Law, the Liberty, Life and Law Foundation, and the National Association of Evangelicals) the acceptance of same-sex marriage amounts to a total inversion of human sexuality. Remember also that, according to others (the Beckett Fund and for the Christian Legal Society), Christians are commanded by God not to participate in what they consider to be the evil of abortion. Still, no matter how bad they consider the substance of the law in question, these groups make a preponderance of arguments supporting a view that any law is supportable if it is neutral, the outcome of a pluralist power struggle, a reflection of individual autonomy and supported by positive practical results.

The issue here is the logical coherence of the Christian conservative legal worldview. Its coherence or lack of coherence turns on the same question raised in the Hart-Fuller debate over Nazi laws, which lies at the center of the debate between Natural Law and Legal Positivism: are substantively immoral laws actually laws or not? According to positivism, they are, and judges are technically bound by them. According to Natural Law and, as we have seen, even according to the Constitution itself, they are not. Thus, judges can escape the moral-formal dilemma entirely by declaring this to be the case and explaining why.

B. A Problem for Us All: Defects in Democratic Deliberation

A deeper problem with the Christian conservative embrace of the immanent frame and the modern moral order that arises from that frame is its harmful effect on democratic moral deliberation. Positions on issues like abortion, contraception, homosexuality, and other moral issues are deeply-held and personally significant for activists and thinkers on both sides. They cut to the heart of much more basic issues necessary for any democracy to answer, such as "what is a person?" "what rights and obligations do those persons have?" and "how should those rights and obligations be adjudicated when there is a conflict?" In order for these and other questions to be debated and decided in a rational and deliberative way, the arguments made should certainly follow the proper institutional procedures. But proper institutional procedures are not enough. Other substantive ethical requirements, such as "mutual respect," "openness to revision," the making of arguments based on "public reasons" are also necessary (see Klemp 2010, 4-6).

Many Christian intellectuals agree with the necessity of observing these deliberative norms, especially the norm of "public reasons" (see Covington 2009). Some, for example, have

called for "common ground on which Christians and non-Christians in a pluralistic society might engage in meaningful ethical conversation or debate" (Charles 2008, 22). Others have urged their fellow Christians to work toward a more "meaningful engagement with the broader community" (Budziszewski 2006, 27). A transcendent perspective is the key to this project, because it offers "the potential for shareable moral knowledge" (Covington 2009, 1). Arguments that transcend the immediacy of political and social struggle and focus instead on more general claims about the human condition and its possibilities for transformation can provide common ground for a more charitable and equitable debate. This sort of common ground is especially important in contemporary American culture, where people seem increasingly willing to simply talk past each other rather than to try and engage opposing arguments (see MacIntyre 1984). Since we share less and less common moral ground, our arguments become increasingly opportunistic and demagogic.

Proponents of abortion and same-sex marriage have primarily succeeded in the courts, while opponents of those practices have primarily succeeded at the ballot box. Thus, from a purely strategic point of view, in order to convince voters and legislators, Christian conservative legal arguments must engage the substance of the laws in question. But this is true in the courts as well. In order for Christian conservatives to convince judges to uphold traditional moral laws, they must provide reasoned and coherent arguments about the substance of constitutional provisions. Some of this does take place. But more often it seems that Christian conservatives skip this arduous task and instead fall back on tired, demagogic arguments that attempt to match their liberal counterparts blow for blow.

To be clear, not all of the arguments in these briefs – including those made by the talented lawyers at the Beckett Fund for Religious Liberty, the Christian Legal Society, and many others – are demagogic. And it may well be that the only thing lawyers and intellectuals can do in a situation where most of the values they hold dear are slipping away is try to get on the right side of history in some way by playing to increasingly settled assumptions about liberal neutrality and individual conscience. But these understandable motivations may also be balanced by an even greater desire to appear respectable by being clothed in the newest intellectual fashions.

To be clear on another crucial point, religious conservatives are not the only ones engaging in demagoguery and political opportunism. Advocates of same-sex marriage and abortion too often fall back on their own tired, demagogic arguments about "hate," "bigotry," and the dangers of "theocracy" (see, e.g, Daily Kos 2011). But since it is precisely the moral and ethical basis of democratic debate that is at stake in the current culture war, it does not seem too much to ask that those most concerned with preserving and advancing morality as the basis of legal legitimacy – Christian conservatives – make sure that they are living up to their own ideals.

C. The Deepest Problem: The Modern Moral Order

The immanent frame and the modern moral order have brought about many significant advances in science, government, and culture. But these advances have come with a price. One price of the MMO's closure to transcendence is a paradoxical urge toward conformity, resulting in intolerance. Charles Taylor agrees (as do I) with some of these Christian conservatives that modern society is

> frequently dismissive of, and sometimes cruel to deviants, classing them as misfits or people actuated by ill-will. Contemporary examples can be found in some of the policies generated by "political correctness," which impose either mandatory reeducation or harsh punishments, or both, on deviants from the various "codes," who are frequently accused of "racism," or "misogyny" for the least infraction (Taylor 2007, 632).

For example, opponents of same-sex marriage and forced funding of contraception and abortion are frequently described as filled with "hate," "bigotry," and secretly plotting a "theocracy" (see, e.g, Daily Kos 2011).

This urge to conformity and intolerance can be traced to an underlying belief in the limitless malleability of human behavior and identity (Taylor 2007, 633-34). A society committed to "exclusive humanism" has rejected the idea of any essential human nature that cannot, or should not, be altered. Problematic human actions, such as "violence, aggression, domination and/or . . . wild sexual license" are classified not as ethical problems but as evidence of "pathology or under-development" (Taylor 2007, 633). Since these problems are not seen as intrinsic to human nature, they "are simply to be extirpated, removed by therapy, reeducation, or the threat of force" in order to produce "greater harmony" in society (Taylor 2007, 633). Thus, a society governed by a purely immanent frame risks devolving into "paternalistic psychic engineering" (Taylor 2007, 633).

Another tragic price of the immanent frame and the MMO is increasing dehumanization and loss of meaning. Unsupported by a believable narrative" about who we are and why we exist, modern routines of everyday life

> can come to seem a prison confining us to meaningless repetition. . . . Or else, these routines themselves can fail to integrate our lives; this either because we are expelled from them, or not allowed to enter them, or remain outside them – through unemployment, forced idleness, or an inability/unwillingness to take on the [required] disciplines. . . . Or else again, the routines are still there, but they fail to . . . give unity to the whole span of a life, much less unite our lives with those of our ancestors and successors. Taylor 2007, 718-19).

Without a faith in transcendence, we live in a flattened world of actions without any intrinsic linkage. A purely immanent world is one where society is imagined "'horizontally,' unrelated to any 'high points,' where the ordinary sequence of events touches 'higher time. . . ." (Taylor 2007, 208-09, citing Anderson 1991). In such a world, people come to yearn for "eternity" – not necessarily the surpassing of time, but the "prospect of a redeemed or gathered time, in which all moments are reconnected in the same movement" (Taylor 2007, 750). People also come to yearn for true community, not only being part of a common enterprise with contemporaries but also being part of a "communion" of both ancestors and successors (Taylor 2007, 751).

By perpetuating the immanent frame and the MMO, both Christian conservatives and secular progressives are buying into this flattened, homogenized, socially engineered world of purely constructed meaning. This is the same purely immanent world that Christian conservatives are fighting against in the courts. Marriage and sexuality, they argue, have been reduced to vehicles of mutual pleasure and happiness rather than organic unions based on the divine law of self-gift (see George 2009). Unintended reproduction has become a burden from which to be released or even an "epidemic" to be subjected to "preventive medicine" rather than

a participation in God's creative remaking of the world (see, e.g., Rovner 2011). But by accepting legal positivism as the reigning orthodoxy in the courts, Christian conservatives obscure the transcendent alternatives within their own worldview, which offer hope for transforming the MMO.

Christianity – not merely contemporary Christian conservative legal activism, but the great stream of the Christian tradition down through the ages – has always seen itself as proposing transcendent solutions to problems like the ones engendered by a purely immanent frame. Christianity proposes that "the highest good" of a society and an individual – the social harmony or mutual benefit that the MMO so desperately seeks to engineer – is found in "communion, mutual giving and receiving . . . where each is a gift to the other" (Taylor 2007, 702). That mutual self-giving is not a product of changing social institutions and practices from the outside but rather a "change from within" through an authentic "*metanoia*" or conversion (Willard 1988, 227). This conversion is a participation in God's love that transforms the human heart (Taylor 2007, 224, 430). Christian conversion promises to "transform *normal* human character away from its usually high level of readiness to . . . harm others for the sake of our own fear, pride, lust, greed, envy, and indifference" (Willard, 1988, 232).

This level of individual change, and the social change that results from it, can never be brought about through changing human laws or social structures, but depends instead on contact with a transcendent God. The Christian call to love God, and love creatures in the fulsome way that God does, is thus matched by the promise of a change which will make these heights attainable for us" (Taylor 2007, 224). This change comes in the form of "a new person pervaded by the positive realities of faith, hope, and love" out of which "justice, peace, and prosperity" can

flow (Willard 1988, 221). Justice, peace, and prosperity are "genuine moral imperative[s]" that can only be achieved through transcendence because they are based on "the unity of love" (Willard 2009, 196). The attempt to impose human unity through immanent "social and governmental arrangements . . . becomes a blood-soaked curse upon the earth at the hands of those [believers and non-believers] who would *force* their way on others" (Willard 2009, 196).

As a result, true human communion and solidarity "can be real for us . . . only to the extent that we open ourselves up to God, which means in fact overstepping the limits [of] exclusive humanism[]" (Taylor 2007, 703). Only by overstepping those bounds can one have "something very important to say to modern times, something that addresses the fragility of what all of us, believer and unbeliever alike, most value in these times" (Taylor 2007, 703).

But modern Christianity – including legally active Christian conservatism – has very little of value to say to "modern times" because it is just as wrapped up in those times as secularism. As a result, "more often than not, [Christian] faith has failed . . . to transform the human character . . . because it is usually unaccompanied by" an attempt to allow ourselves to be converted by participation in God's love (Willard 1988, 221). Instead, modern Christianity's turn away from this transcendent view of human action as participating in a higher divine reality – what early Christians used to call *theiosis* or divinization – toward a positivist view of human action as self-constituting has been responsible for much of the anomie, alienation, and moral confusion characteristic of the MMO (Taylor 2007, 194, 278-80). "The hegemony of atomist pictures of agency in modern culture militates against" true human benevolence because it leaves no room for deep human transformation (Taylor 2007, 280).

D. Preserving the Radical Potential of Christianity

Modern Christian conservatism obfuscates the goal of individual and social transformation at the heart of Christianity because, like the secularizing MMO, it is based on a false closure of social reality – a closure that limits human flourishing to the standards invented by human beings (Taylor 2007, 769-71, 430). The greatest question now faced by Christian conservatism is "whether it can really present the world with a new humanity or whether it is only attractive for the moment because it seems to support certain traditional values that comfort a people bewildered and frightened by the future" (Willard 1988, 236). In fact, this is the primary question faced by both secular liberalism and Christian conservatism: will they accept the modern insistence that true human transformation will come about through human efforts, or will they seek transcendent help (Taylor 2007, 431). So far, both sides have chosen the former.

In this sense Christian conservative legal arguments are part of the long-term corruption of Christianity – the transformation of Christianity from a network of *agape* love into an exacting legal or moral code (Taylor 2007, 706):

> At the heart of orthodox Christianity . . . is the coming of God through Christ into a personal relation with disciples, and beyond them others, eventually ramifying through the church to humanity as a whole. . . . The lifeblood of this new relation is agape, which can't ever be understood simply in terms of a set of rules, but rather as the extension of a certain kind of relation, spreading outward in a network (Taylor 2007, 282).

One of the hallmarks of the MMO is the abandonment of such a communal ethic and the reduction of morality to a code, such as a set of positivist legal "rules of do's and don'ts. . . ."

(Taylor 2007, 282). But a code of rules is "rather hostile to an ethics of virtue or the good, such as that of Aristotle," and even more hostile to the "Christian conception, where the highest way of life can't be explained in terms of rules, but rather is rooted in a certain relation to God. . . ." (Taylor 2007, 282). Moral and legal codes always hold out the possibility that people can transform themselves if only they will try hard enough to be good enough. This is actually the opposite of the Christian incarnational view, which holds that God "responds to the flawed efforts of flawed humankind to reach him – *by reaching them* (Willard 2009, 180-81).

For this reason, "Christian morality "can never be decanted into a fixed code . . . [because] it always places our actions in two dimensions" – right action, and right relationship with an "eschatological dimension" that calls humans to transcend ordinary ethical space entirely (Taylor 2007, 706). Therefore, Christian conservatives, who believe in an incarnate God, are thus "denying something essential" to themselves and the world as long as they remain "wedded to forms" like legal positivism, which excarnate" into legal and moral codes (Taylor 2007, 771).

This code-based, positivist, mentality could explain "how little impact" Christian conservatives have had on the underlying problems of society (Willard 1988, 264). As one of the most ardent and intelligent expositors of Christianity has noted, "the current [weak] position of the [Christian] church in our world may be better explained by what liberals and conservatives have shared, than by how they differ" (Willard 1988, 264). And what liberal and conservative Christians share is precisely the reduction of Christianity down to an affirmation of a code rather than the pursuit of divine likeness, which is the only "type of life" that is "adequate to the human soul or the needs of our world" (Willard 1988, 265). The Christian conservative code-based approach to moral issues thus "lose[s] sight of the greater transformation which Christian faith

holds out," which is "the raising of the human life to the divine . . ." (Taylor 2007, 737) and the promise that "the law of God will become [a] natural habit pattern[] . . . written in [the] heart" (Willard 1988, 247).

Within the immanent legal frame of positivism, even if Christian conservatives prevail in the culture wars, they will succeed in truncating the public identity of Christianity and making it merely one valid option among many in the legal marketplace. Success with positivist arguments would come at the expense of dislodging Christian truth claims from their "lofty dwelling with the divine" and place these claims "squarely within the baser realm" of a pluralist political competition (Brown 2002, 143). There is, of course, something very Christian about pluralism in the general sense of "treating well" those with whom we disagree, "and being appropriately modest and nondogmatic about our own views" (Willard 2009, 171). But the stronger version of pluralism "now commonly held by most people, especially academics" is a threat to any strong substantive religious claims because it claims that all views are equal (Willard 2009, 173). "If religion is understood" in this strong pluralist framework "as just a benign point of view that some people happen to have, then by implication, religion is harmless, a meaningless difference. It becomes simply a brand name, or a political party, or a Hallmark card sentiment. . . ." (Sullivan 1996, 295, quoted in Brown 2002, 144). Ironically, then, a movement whose major goal has been to "return to the 'better' days when Christianity enjoyed an undisputed nationwide hegemony and de facto establishment" may wind up affirming the

post-modern relativist mind, in which every statement is of equal value to any other" (Davis 1998, 154, quoted in Brown 2002, 143).[3]

"For many Americans . . . their very sense that there [is] something higher to aim at, some better and more moral way of life, [is] indissolubly connected to God" (Taylor 2007, 544). This connection to God "is not just a matter of my own experience of the good, but something which is woven into a cherished and crucial collective identity" (Taylor 2007, 545). Because of this American identification with transcendence, improving democratic deliberation and addressing the systematic legal maladies of our modern moral order requires liberation from the immanent frame of legal positivism. This liberation would involve moving both the American left and the American right out of the wilderness of endless culture wars and into a more productive dialogue about the meaning of true human flourishing.

[3] This characterization of postmodernism is problematic for many reasons, especially the implication that value relativism is a postmodern, rather than a modern, phenomenon. Nevertheless, it remains apt as a warning against Christian conservatism undercutting its own goals.

References

Briefs

Beckett Fund for Religious Liberty. 2013. *Amicus Curiae* Brief in *U.S. v. Windsor* (U.S.S.C., No. 12-307).

___. 2014. *Amicus Curiae* Brief in *Burwell v. Hobby Lobby* (U.S.S.C., No. 13-354).

Beverly Lahaye Institute and the National Legal Foundation. 2013. *Amicus Curiae* Brief in *U.S. v. Windsor* (U.S.S.C., No. 12-307).

Beverly Lahaye Institute and Janice Shaw Crouse, Ph.D.. 2014. *Amicus Curiae* Brief in *Burwell v. Hobby Lobby* (U.S.S.C., No. 13-354).

Christian Legal Society, Catholic Answers, and Catholic Vote Education Fund. 2013. *Amicus Curiae* Brief in *U.S. v. Windsor* (U.S.S.C., No. 12-307).

Christian Legal Society, American Bible Society, Anglican Church in North America, Association of Christian Schools International, Association of Gospel Rescue Missions, The Church of Jesus Christ of Latter-Day Saints, the Ethics & Religious Liberty Commission of the Southern Baptist Convention, the Lutheran Church – Missouri Synod, Prison Fellowship Ministries, and World Vision, Inc. 2014. *Amicus Curiae* Brief in *Burwell v. Hobby Lobby* (U.S.S.C., No. 13-354).

Eagle Forum Education & Legal Defense Fund, Inc. 2013. *Amicus Curiae* Brief in *U.S. v. Windsor* (U.S.S.C., No. 12-307).

___. 2014. *Amicus Curiae* Brief in *Burwell v. Hobby Lobby* (U.S.S.C., No. 13-354).

Family Research Council. 2013. *Amicus Curiae* Brief in *U.S. v. Windsor* (U.S.S.C., No. 12-307).

___. 2014. *Amicus Curiae* Brief in *Burwell v. Hobby Lobby* (U.S.S.C., No. 13-354).

Foundation for Moral Law. 2013. *Amicus Curiae* Brief in *U.S. v. Windsor* (U.S.S.C., No. 12-307).

___. 2014. *Amicus Curiae* Brief in *Burwell v. Hobby Lobby* (U.S.S.C., No. 13-354).

Liberty, Life, and Law Foundation, and North Carolina Values Coalition. 2013. *Amicus Curiae* Brief in *U.S. v. Windsor* (U.S.S.C., No. 12-307).

Liberty, Life, and Law Foundation, Thomas More Society, and Christian Family Coalition. 2014. *Amicus Curiae* Brief in *Burwell v. Hobby Lobby* (U.S.S.C., No. 13-354).

National Association of Evangelicals, the Ethics & Religious Liberty Commission of the Southern Baptist Convention, the Church of Jesus Christ of Latter-Day Saints, the Lutheran Church-Missouri Synod, the Romanian-American Evangelical Alliance of North America, and Truth in Action Ministries. 2013. *Amicus Curiae* Brief in *U.S. v. Windsor* (U.S.S.C., No. 12-307).

National Association of Evangelicals. 2014. *Amicus Curiae* Brief in *Burwell v. Hobby Lobby* (U.S.S.C., No. 13-354).

Books and Articles

Adams, John. 1854. *The Works of John Adams, Second President of the United States*. Ed. Charles Francis Adams. Vol. IX. Boston: Little, Brown.

Aquinas, St. Thomas. 1958. *Summa Theologica*, First Part of the Second Part. Reprinted in Clarence Morris, *The Great Legal Philosophers*. Philadelphia: University of Pennsylvania Press.

Aristotle. 1958. *Nicomachean Ethics*, Book V. Reprinted in Clarence Morris, *The Great Legal Philosophers*. Philadelphia: University of Pennsylvania Press.

Arkes, Hadley. 2010. *Constitutional Illusions and Anchoring Truths: The Touchstone of the Natural Law*. Cambridge University Press.

Austin, John. 1958. *Lectures on Jurisprudence*. Reprinted in Clarence Morris, *The Great Legal Philosophers*. Philadelphia: University of Pennsylvania Press.

Barton, David. 2003. *Restraining Judicial Activism.* Wallbuilder Press.

Beckwith, Francis and Greg Koukl. 1998. *Relativism: Feet Firmly Planted in Mid-Air.* Baker Books.

Bentham, Jeremy. 1958. *An Introduction to the Principles of Morals and Legislation*. Reprinted in Clarence Morris, *The Great Legal Philosophers*. Philadelphia: University of Pennsylvania Press.

Berger, Peter L. 1997. "On the Future of Conservatism: A Symposium." *Commentary* 103: 17.

Berlin, Isaiah. 1969. "Two Concepts of Liberty." In *Four Essays on Liberty.* Oxford University Press.

Bernstein, David E. 2003. "Defending the First Amendment From Antidiscrimination." *North Carolina Law Review* 82: 223.

Bickel, Alexander. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Bobbs-Merrill Press.

Black, Rufus. 2000. "Is the New Natural Law Theory Christian?" In *The Revival of Natural Law: Philosophical, Theological, and Ethical Responses to the Finnis-Grisez School*. Ed. Nigel Biggar and Rufus Black. Burlington, VT: Ashgate Publishing.

Brown, Steven P. 2002. *Trumping Religion: The New Christian Right, The Free Speech Clause and the Courts*. University of Alabama Press.

Budziszewski, J. 2006. *Evangelicals in the Public Square*. Grand Rapids: Baker Academic.

Callaghan, Nora. 2006. "Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right." *Creighton Law Review* 39: 561.banning

Calvin, John. 1999. *Commentary on Galatians and Ephesians.* Christian Classics Ethereal Library. Available at: http://www.ccel.org/ccel/calvin/comment3/comm_vol41/htm/iv.vi.iii.htm

Catholic University of America. "Meet President John Garvey." Available at: http://president.cua.edu/profile-garvey.cfm

Charles, J. Daryl. 2008. *Retrieving the Natural Law: A Return to Moral First Things*. Grand Rapids, MI.

CNN.com. 2009. "Maine Rejects Same-Sex Marriage Law." Posted Nov. 4, 2009.

Cicero, Marcus Tullias. 1958. *Laws*, Book 1. Reprinted in Clarence Morris, *The Great Legal Philosophers*. Philadelphia: University of Pennsylvania Press.

Colson, Charles and Richard M. Neuhaus, eds. *Evangelicals and Catholics Together: Toward a Common Mission*. Nashville: Thomas Nelson Publishers.

Cover, Robert M. 1975. *Justice Accused: Anti-Slavery and the Judicial Process*. New Haven, CT: Yale University Press.

Covington, Jesse. 2009. "Folly to the Nations? Cultural Apologetics, Natural Law, and Evangelical Political Thought." Paper Presented to the Annual Meeting of the American Political Science Association. Toronto, Canada. Sep. 3-6, 2009.

Crane, Anita. "Kevin Hasson on the right to life and religious liberty." *Celebrate Life Magazine*, available at http://www.clmagazine.org/article/index/id/OTM2MQ/.

Daily Kos Community Site. 2011. "Hate, Lies, and Bigotry: Thy Name is Cornyn." Posted on Monday, March 21. Available at: http://www.dailykos.com/story/2011/03/21/958737/-Hate,-Lies,-and-Bigotry,-thy-name-is-Cornyn?detail=hide.

Dewart, Deborah J. 2010. *Death of a Christian Nation*. AMG Publishers.

Duncan, Richard F. 1994. "Who Wants to Stop the Church? Homosexual Rights Legislation, Public Policy, and Religious Freedom." *Notre Dame Law Review* 69:393.

Dworkin, Ronald. 1996. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge, MA: Harvard University Press.

___. 1985. *A Matter of Principle*. Cambridge: Harvard University Press.

First Things. 1996. "The End of Democracy? Introduction." *First Things*. November, 1996.

Finnis, Anthony. 1999. "Abortion, Natural Law, and Liberal Discourse." In *Public Reason*. Ed. by Robert P. George and Christopher Wolfe. Washington, D.C.: Georgetown University Press.

Fleming, James. 2001a. "An Exchange With James Fleming." In George, 2001.

___. "Further Comment." 2001b. In George, 2001.

Franck, Matthew J. 2010. "The Lawful Truth." *First Things*. October.

Fuller, Lon. 1958. "Positivism and Fidelity to Law — A Reply to Professor Hart." *Harvard Law Review* 71: 630–672.

George, Robert P. 2009. "What Marriage is and What it Isn't." *First Things*. August/September.

___. 2001. *The Clash of Orthodoxies: Law, Religion and Morality in Crisis*. Wilmington, DE: ISI Books.

___. 2000. "Natural Law and Positive Law." In *Common Truths: New Perspectives on Natural Law*. Wilington, DE: ISI Books.

___. 1999. "Natural Law, the Constitution, and the Theory and Practice of Judicial Review." In *Vital Remnants: America's Founding and the Western Tradition*. Wilmington, DE: ISI Books.

Girgis, Sherif, Robert P. George and Ryan T. Anderson. 2011. "What is Marriage?" *Harvard Journal of Law & Public Policy* 34: 245-87.

Grabill, Stephen J. 2006. *Rediscovering the Natural Law in Reformed Theological Ethics*. Grand Rapids, MI: Eerdmans.

Hamilton, Alexander. 1775. "The Farmer Refuted." Available at www.heritage.org/initiatives/first-principles/primary-sources/

Hart, H.L.A. 1961. *The Concept of Law*. New York: Oxford University Press.

___. 1958. "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71:593-629.

Hittinger, Russell. 2003. *The First Grace: Rediscovering the Natural Law in a Post-Christian World.* Wilmington, DE: ISI Books.

Hobbes, Thomas. 1958. *Leviathan. Reprinted* in Clarence Morris, *The Great Legal Philosophers*. Philadelphia: University of Pennsylvania Press.

Hoover, Dennis R. and Kevin R. Den Dulk. 2004. "Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada. 25 *International Political Science Review* 1: 9-34.

Jefferson, Thomas. 1794. *Notes on the State of Virginia*. Philadelphia: Mathew Carey.

John Paul II, Pope. 1995. *Evangelium Vitae*. Rome: The Vatican.

Jones, Peter. 2006. *The God of Sex*. www.davidcook.com

Klemp, Nathaniel J. 2010. "The Christian Right: Engaged Citizens or Theocratic Crusaders?" *Politics and Religion*. 3: 1–27.

Laycock, Douglas. 2006. "Regulatory Exemptions of Religious Behavior and the

Original Understanding of the Establishment Clause," *Notre Dame Law Review* 81:1793.

___. 2008. "Afterword" to *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*. Laycock, Douglas, Anthony R. Picarello Jr. & Robin Fretwell Wilson eds.

Linton, Paul Benjamin. 1993. "Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court. *St. Louis University Public Law Review* 3:15, 46.

Liptak, Adam. 2009. "Gay Vows, Repeated From State To State." *New York Times*, Apr. 12, 2009.

MacIntyre, Alasdair. 1984. *After Virtue: A Study in Moral Theory*. London: Duckworth Publishing.

Madison, James. 1785. "Memorial and Remonstrance Against Religious Assessments." Available at: http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html

___. 1840. *The Papers of James Madison* ed. Henry Gilpin, Vol. II. Washington: Langtree and O'Sullivan.

McConnell, Michael W. 1987. "The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's 'Moral Reading' of the Constitution." *Fordham Law Review* 65:1269.

___. 1990. "The Origins and Historical Understanding of Free Exercise of Religion,"

Harvard Law Review 103: 1409.

___. 1993. "'God is Dead and We have Killed Him!' Freedom of Religion in the Post-

Modern Age.'" Brigham Young Law Review 1993: 163.

___. 2000. "The Problem of Singling Out Religion," *DePaul Law Review* 50: 1.

Miller, Courtney. 2006. "Note: Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations." *Southern California Review of Law and Social Justice* 15:327.

New York Times. 2012. "A Festive Mood in Maine as Same-Sex Marriage Becomes Legal." Dec. 30, 2012, p. A20.

Peretti, Terri Jennings. 2001. *In Defense of a Political Court*. Princeton University Press.

Rovner, Julie. 2011. "Birth Control Without Copays Could Become Mandatory." *Shots: Health News from NPR,* July 19, 2011. Available at www.npr.org/blogs/health/.

Saunders, William L. 2007. "Bench Pressed: Activist Courts Threaten Not Only Life But Democracy." *Touchstone*. December.

Scalia, Hon. Antonin. 1996. "Of Democracy, Morality, and the Majority." *Origins* 26:81.

Stone, Harlan Fiske. 1919. "The Conscientious Objector," *Columbia University Quarterly* 21: 253.

Taylor, Charles. 2007. *A Secular Age*. Cambridge: Belknap Press of Harvard University.

Willard, Dallas. 2009. *Knowing Christ Today: Why We Can Trust Spiritual Knowledge*. San Francisco: Harper and Row.

___. 1988. *The Spirit of the Disciplines: Understanding How God Changes Lives*. San Francisco: Harper and Row.

Williams Catholic Network. "Board of Directors." Available at: http://www.williamscatholicnetwork.com/