

Introduction

This book addresses large topics – God, religion, and conscience – but it does so from a normative, legal perspective. It tries to reset the relationship between these transcultural aspects of human experience and the secular legal systems of democratic societies in an era of globalization. It offers a legal paradigm for diagnosing situations and guiding legal action. The argument is general and evaluative. It is general in that it is not tied to any particular legal system of Western culture and it is evaluative in that it aims to provide the best justification for principles that inform and justify secular legal systems.

The core of the argument is the idea that secular legal systems should treat God, religion, and conscience with respect. Respect demands not only positive feelings or deference toward these realities, but also specific actions that express and reflect that appreciation. Of the secular legal system, in the case of God, respect requires recognition; in the case of religion, toleration; and in the case of conscience, accommodation. And of citizens, in the case of God, respect requires free mention and invocation; in the case of religion, free exercise and practice; in the case of conscience, moral autonomy.

In this book, the term *secular* is meant to be neither ideological nor exclusionary.¹ It is neither a provocation to religion nor a path to escape from religion. I use the term *secular* in the general sense of a realm or reality that can and should be

¹ For an explanation of the different dynamics of Western secularization, see, among others, Talal Asad, *Formations of the Secular. Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003) esp. pp. 1–17; Charles Taylor, *A Secular Age* (Cambridge, MA, London: The Belknap Press of Harvard University Press, 2007) esp. pp. 1–22; Jürgen Habermas and Joseph Ratzinger, *The Dialectic of Secularization. On Reason and Religion* (trans. Brian McNeill, San Francisco: Ignatius Press, 2010); Paul Cliteur, *The Secular Outlook. In Defense of Moral and Political Secularism* (Malden, MA, Oxford: Wiley-Blackwell, 2010) esp. pp. 172–280; Michael Warner, Jonathan Van Antwerpen, and Craig Calhoun (eds.), *Varieties of Secularism in Secular Age* (Cambridge, MA, London: Harvard University Press, reprint 2013); and Niklas Luhmann, *A Systems Theory of Religion* (trans. David A. Brenner with Adrian Hermann, Stanford, CA: Stanford University Press, 2013) pp. 201–231.

differentiated from the religious realm or reality. It simply means the nonreligious; however, neither secularism nor religion is a residual category.² Secularization, which first emerged in Western Christian culture, is the process of differentiating secular from religious institutions. This theological idea has no equivalent in other religious traditions or in Eastern Christianity. In many European countries, and in the formation of the European Union, this process was historically related to a progressive and cumulative decline of the practice of religion and the privatization of religion. But the link is not a necessary one. The creation, democratization, and modernization of the United States, for instance, were accompanied and followed by a religious revival.³

As a central phenomenon of our secular age,⁴ secularization requires legal thinkers and lawmakers to adapt and rework different approaches to law and, by extension, to reshape constitutional and other legal schemes for the separation of church and state: conceptual models and patterns for differentiating law, morality, and religion. This challenge affects the inner pillars of political communities and essential principles of legal systems.

This book defines a secular legal system in general terms, as a system not based on religion (i.e., a system in which there is a structural and substantive separation of religious sources from legal sources). The purpose of a secular legal system is to enable citizens to live and develop together within a single framework, despite disagreement over fundamentals.⁵ The assumption of a common human reason provides the epistemic justification for a legal system that does not depend on religious legitimation.⁶ Secular legal systems draw exclusively on legal sources and authorities (i.e., they do not include constitutional theocracies).⁷ Constitutional systems based on a principle of church–state cooperation are included in the category

² See along these lines José Casanova, “The Secular, Secularizations, Secularism,” in Craig Calhoun, Mark Juergensmeyer, and Jonathan Van Antwerpen (eds.), *Rethinking Secularism* (Oxford, New York: Oxford University Press, 2011) pp. 54–74, esp. p. 56.

³ Tocqueville famously described religion in the United States as a “political institution which powerfully supports,” suggesting that religion was stronger in the United States than in any other country. See Alexis de Tocqueville, *Democracy in America I* (ed. Isaac Kramnick, trans. Gerald Bevan, London, New York: Penguin Books, 2003) p. 336.

⁴ The fact that we are living in a secular age is compatible with a current crisis of secularism that started with the formation of the first modern theocracy in Iran and spread to many countries: Afghanistan, Sudan, Algeria, Tunisia, Ethiopia, Chad, among others. However, anti-secularism cannot be restricted to Muslim societies. Hindu nationalism in India, Sinhalese Buddhist nationalism in Sri Lanka, and religious ultraorthodoxy in Israel are also movements against secularism. For a good overview, see Rajeev Bhargava, “Rehabilitating Secularism,” in *Rethinking Secularism* (ed. Craig Calhoun, Mark Juergensmeyer, and Jonathan Van Antwerpen, Oxford, New York: Oxford University Press, 2011) pp. 92–113, esp. 92–93.

⁵ Jeremy Waldron, *Law and Disagreement* (Oxford, New York: Oxford University Press, 1999) p. 7.

⁶ In this vein, see Jürgen Habermas, *Between Naturalism and Religion* (trans. Ciaran Cronin, Cambridge, UK, Malden, MA: Polity, 2010) p. 120.

⁷ For the concept of constitutional theocracy, see Ran Hirschl, *Constitutional Theocracy* (Cambridge, MA, London: Harvard University Press, 2012).

of secular legal systems, however, provided that they are justified by legal, and not religious, arguments and rationales. Thus, secular legal systems do not by definition require *strict neutrality* on religious issues. Other less strict (i.e., more religion-favorable) forms of separation exist that are consistent with secular systems. A theistic worldview is reasonable and consistent with secular argumentation, and any properly secular legal system in my sense must respect this fact. A legal system committed to secularism as a substantive irreligious position becomes irreligious and no longer secular in the relevant sense.

I will use the expression *political community* in the broadest sense of an institutional system of social cooperation⁸ governed by a constitutional authority under the rule of law. And I will use the expression *religious communities* to indicate an institutional system of religious and creedal cooperation, usually governed by a religious authority under religious and transcendent or (as I will call it) suprarational law.

The aim of this book is to contribute to an emerging (and challenging) international debate on the rights and liberties of religion, beliefs, and conscience in an era of secularization. One hallmark of this new era is that belief in God has gone from being a social assumption or norm to being at best a respected option.⁹ Although often downplayed by legal thinkers, lawyers, and politicians, this shift has important implications, which justifies the title of this book.

We jurists cannot change the historic presupposition of Western systems that there is a personal and active God such as the one on which the great monotheistic religions are centered. But we should be aware that worldwide religious diversity and political globalization have brought new demands for the respect of religion, on the one hand, and equal treatment of citizens, regardless of their creed (or lack thereof), on the other. We should also be aware that atheistic humanism, republican laicism, ideological secularism, and many other current social trends constitute real and growing alternatives to traditional values and understandings.

The assumption of the existence (and supremacy) of God was not originally at the heart of Western legal culture, but neither was it viewed as problematic in the way it is today. The first legal order of the West – pre-Christian Roman law – was not based on monotheistic ideas; it was a product of the secularization of pagan Roman religions. Its concept of *ius*, from which justice, jurisprudence, judge, and judiciary come, was itself derived from religion, but it was not monotheistic in character.¹⁰

⁸ I take the expression from John Rawls, “Fundamental Ideas,” in *Political Liberalism* (expanded edition, New York: Columbia University Press, 2005) esp. p. 16.

⁹ In the same vein, see Charles Taylor, *A Secular Age* (Cambridge, MA, London: The Belknap Press of Harvard University Press, 2007) p. 3. According to Taylor, the essence of the secular in our time is the phenomenological experience of living within an immanent frame that embraces the cosmic, the social, and the moral. Inside this secular frame, believing in God is not only no longer axiomatic, but even increasingly problematic.

¹⁰ The word *ius* was probably derived from Jupiter or Jove (in Latin: Iuppiter, genitive: Iovis). In ancient Roman religion and myth, Jupiter was the god of sky and thunder, the king of the gods, and the chief

Roman law shaped Western legal culture solely until the birth of canon law and European *ius commune* (each firmly grounded in monotheistic ideas).¹¹ However, while pre-Christian Roman law was not founded on monotheistic values, at its core was the strong conviction that the divine, the political, and the legal are intrinsically linked; thus, the legal order expresses only a portion of a much broader normative domain.¹² In my opinion, it would be a historical error to overlook this legacy of pre-Christian Roman law, which has redounded to the benefit of Western societies.

Secular legal systems should no longer treat religion, morality, and conscience as subject matters submitted to God's sovereignty (what I will call the *religious approach*).¹³ This starting point of a prevalent Protestant theology gave birth to the right to religious freedom¹⁴ and firmly supported the essential rights and liberties of religion in early American constitutionalism, which was against the English tradition of Anglican establishment.¹⁵ This religious approach was very successful in the political arena as long as society was grounded, and socially accepted as grounded, in Christian values and ideals; however, it cannot remain effective today,

deity of Roman state religion. However, Hugo Grotius affirms that *ius* was probably derived from the word *iussum* (command), just as the word bone (*os*) was a shortening of *ossum*. See Hugo Grotius, *De Iure Belli ac Pacis Libri Tres*, Prolegomena 13 note 3 (trans. Francis W. Kelsey, Oxford: Clarendon Press, 1925, reprint W. S. Hein, Buffalo, NY, 2005) vol. II, p. 14. For an excellent overview of the origin and the idea of *ius*, see Franz Wieacker, *Römische Rechtsgeschichte I* (Beck Verlag, Munich, 1988) §§12–13, pp. 236–286.

¹¹ For a deeper overview, see Peter Stein, *Roman Law in European History* (Cambridge, New York: Cambridge University Press, 1999). R. C. van Caenegem, *The Birth of English Common Law* (Cambridge, New York: Cambridge University Press, 1988) and R. C. van Caenegem, *European Law in the Past and in the Future* (Cambridge, New York: Cambridge University Press, 2002). Always suggestive is Franz Wieacker, *A History of Private Law in Europe* (trans. Tony Weir, Oxford, New York: Oxford University Press, 1995).

¹² This conviction is just a manifestation of the deepest Greek philosophical conviction that nature (*physis*) transcends human will by limiting its decisions, and it is the foundation for the universality of certain norms (*nomos*) applicable to all people of all times just by virtue of their humanity. In this vein, see Rémi Brague, *The Law of God. The Philosophical History of an Idea* (trans. Lydia G. Cochrane, Chicago, London: Chicago University Press, 2007) esp. pp. 11–15. See also Anthony A. Long, "Law and Nature in Greek Thought," in *The Cambridge Companion to Ancient Greek Law* (ed. Michael Gagarin and David Cohen, Cambridge, New York: Cambridge University Press, 2005) pp. 412–430.

¹³ See, for instance, the Westminster Confession of Faith (1646), chapter 20 section 2, which highlights the divine qualities of freedom of conscience: "God alone is Lord of the conscience, and has left it free from the doctrines and commandments of men, which are, in anything, contrary to His Word; or beside it, if matters of faith, or worship." (http://www.reformed.org/documents/wcf_with_proofs/index.html). For a current defense of the religious approach, see Michael Stine Paulsen, "The Priority of God. A Theory of Religious Liberty," in *Pepperdine Law Review* 39 (2013) 1159–1222.

¹⁴ For an overview about the birth of religious freedom, see John Witte, Jr., *The Reformation of Rights. Law, Religion and Human Rights in Early Modern Calvinism* (Cambridge, New York: Cambridge University Press, 2007) pp. 39–80 and 321–344.

¹⁵ For an overview of this rights and liberties in the American constitutional tradition, see John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment* (3rd ed., Boulder, CO: Westview Press, 2011) pp. 41–70. See also T. Jeremy Gunn and John Witte, Jr. (eds.), *No Establishment of Religion. America's Original Contribution to Religious Liberty* (New York, Oxford: Oxford University Press, 2012).

as religious diversity and globalization change political conditions. On the other hand, this approach cannot be considered irrational, as a religiously committed account is by no means contrary to reason.¹⁶

The idea of the conscience being the *voice of God* is a deep Christian theological doctrine shared by millions of people, but it is not an acceptable legal argument for grounding rights and liberties of religion. The idea that religion is “the duty which we owe our Creator and the manner of discharging it,”¹⁷ according to James Madison, the father of religious freedom in the United States, was a beautiful and valid statement for centuries; however, it is no longer a common legal denominator across all religions, theistic and nontheistic. God is not the fundamental category of all religions.

Secular legal systems demand an intrinsic secular justification, not simply a religious one. They cannot base the moral principles that support the state constitution exclusively on arguments that presuppose the existence of God. An intermediate step is required. On the other hand, excluding religious argument from legal reasoning does not imply excluding religion from democratic deliberation, let alone from the public sphere, as liberal approaches to religious freedom typically demand, especially since the Rawlsian idea of public reason¹⁸ came to dominate political discourse. Secular legal reasoning can promote and protect religious values without invoking religious arguments.

Some contemporary American defenders of the religious approach appeal to the need to discover and recover the original meaning and/or intent of the U.S. Constitution (i.e., originalism)¹⁹ in order to apply today the same principles on which the Founding Fathers relied in framing the nation’s constitutional structure. Originalists insist that the Constitution continues to mean what it meant at the time it was ratified. As result, they advocate for the disincorporation of the establishment clause of the First Amendment²⁰ and for state accommodation to be used

¹⁶ On the rationality of religious commitment, Robert Audi, *Rationality and Religious Commitment* (Oxford: Clarendon Press, 2011) esp. pp. 191–285.

¹⁷ Cf. James Madison, “Memorial and Remonstrance against Religious Assessments” (1785) no. 1; electronic version online: www.religiousfreedom.lib.virginia.edu.

¹⁸ See, John Rawls, “The Idea of Public Reason Revisited,” in *University of Chicago Law Review* 64 (1997) 765–807; also published in John Rawls, *Political Liberalism* (expanded edition, New York: Columbia University Press, reprint 2005) pp. 437–490; and John Rawls, *The Law of Peoples* (Cambridge, MA, London: Harvard University Press, 1999) pp. 129–180. This essay is a revision of a lecture given by Rawls at the University of Chicago Law School in November 1993.

¹⁹ For an overview on originalism, see Steve G. Calabresi (ed.), *Originalism. A Quarter Century of Debate* (Washington, DC: Regnery Publishing Inc., 2007); and John O. McGinnis and Michael B. Rappaport, *Originalism and the Good Constitution* (Cambridge, MA, London: Harvard University Press, 2013); and Frank Cross, *The Failed Promise of Originalism* (Stanford: Stanford University Press, 2013).

²⁰ I.e., by restricting the application of the First Amendment (adopted December 15, 1791) to the federal government (“Congress”), according to the original meaning of the religion clauses: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

to resolve the question of religious diversity and pluralism in twenty-first-century America. Though originalism is an appealing method of interpretation, it suffers from two flaws: first, constitutional sources are incomplete; and second, historical circumstances are totally different in our time from how they were in the founding era. Moreover, and perhaps most decisively for our purposes here, originalism is an interpretative method, not a defense of any particular constitutional structure being just or wise.

Current European defenders of the religious approach appeal to the need to rediscover Europe's strongly Christian roots and traditions, which are intrinsic to European culture.²¹ They defend religious values as the materials needed for building a more unified European Union by providing historical, cultural, anthropological, sociological, and religious reasons, without using a secular legal argument. Traditions and roots are important for legal development but they can and sometimes should be downplayed or abandoned to open the doors to new solutions to cultural challenges. History is a good ally, but the historical argument is never conclusive for what is ultimately a normative conclusion.

So while the religious approach must be set aside, the opposite extreme fares no better. God, religion, morality, and conscience cannot be relegated exclusively to the sphere of individual sovereignty (what I will call the *liberal approach*). This new liberal, rationalistic, reductionist, and individualistic approach, which has been firmly consolidated over the last several decades, leads to oversimplifications of the ideas of God, conscience, morality, and religion in political communities. These oversimplifications occur when the only accepted starting point for a legal discussion on religious issues is agnosticism,²² if not atheism, motivated by an unfortunate and misleading idea of neutrality and equality. Ultimately, these approaches imply a type of religious establishment, as they impose a comprehensive framework that simply happens to exclude God. They allow belief in a god that is a caricature of God, as "the distinction between theism and non-theism is [. . .] itself indistinct."²³

According to the liberal approach, God should be reduced to an element of theocratic religions, religion to a subcategory of morality, and morality to a private expression of ethical independence. Therefore, religious freedom is merely a manifestation of the general right to freedom of conscience. Freedom of conscience is understood not in the deep transcendent sense used by the American Founding

²¹ For an overview, see Joseph Weiler, *Un'Europa cristiana: un saggio esplorativo* (Milano: Rizzoli, 2003); Joseph Ratzinger and Marcelino Pera, *Without Roots. The West, Relativism, Christianity, Islam* (trans. Michael F. Moore, New York: Basic Books, 2006); and Lorenzo Lucca, *A Secular Europe. Law and Religion in the European Constitutional Landscape* (Oxford, New York: Oxford University Press, 2012) esp. pp. 67–91.

²² Paul Horwitz, *The Agnostic Era. Law, Religion, and the Constitution* (New York, Oxford: Oxford University Press, 2011).

²³ Ronald Dworkin, *Religion without God* (Cambridge, MA, London: Harvard University Press, 2013) p. 31.

Fathers,²⁴ who were largely influenced by the religious approach, but as the freedom to exercise one's own morality as the most basic expression of human dignity and authenticity. For that reason, only a compelling interest can provide justification for governments that limit this fundamental right to moral freedom, ethical independence, or whatever one might call it. Freedom of religion should be protected as freedom of conscience, because religion is just a matter of conscience – no more and no less.

According to the liberal approach, theistic and nontheistic individuals have the same grounds for moral and political convictions. Dworkin stated that “atheists can therefore accept theists as full partners in their deepest religious ambitions.”²⁵ This liberal approach considers religion to be a value, but only as an expression of private morality, a product of choice, or the result of applying the human faculty in searching for the meaning in life.²⁶ As Michael W. McConnell ironically noted, “religion in public is at best a breach of etiquette, at worst a violation of the law.”²⁷ According to the liberal approach, human dignity lies precisely in this private moral independence, in personal authenticity. For the same reason, this view also considers irreligion a value, as it is every bit as much a moral decision of conscience about fundamental matters and, therefore, a manifestation of private morality. If both religion and irreligion are valuable, religion should be irrelevant to the life of the political community, according to the principle of neutrality. This neutrality with no preference inexorably reduces the role of religion in the public sphere. In fact, the liberal approach is the last great attempt to restore freedom of religion by identifying it with freedom from religion.

According to the liberal approach, expressions of moral independence or private morality (religious manifestations among them) may be limited by political action when they cause harm to others or there is another legitimate governmental purpose. The application of the liberal doctrine gradually leads to the expulsion of religion from the public sphere; for example, when a form of religious expression (e.g., the mention of God or the presence of a religious symbol) bothers an individual, the liberal doctrine claims that discomfort as sufficient grounds for curbing the expression. Therefore, seemingly insignificant religious expressions can be viewed as sectarian forms of exclusion; progressively, religion becomes sectarian. It is understandable that from this point of view, the exclusion of religion from the

²⁴ See John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment* (3rd ed., Boulder, CO: Westview Press, 2011) pp. 1–20.

²⁵ Ronald Dworkin, *Religion without God* (Cambridge, MA London: Harvard University Press, 2013) pp. 146–147. For a critique, see Rafael Domingo, “The Dworkinian Religion of Value,” in *Oxford Journal of Law and Religion* 29.3 (2014) 1–9.

²⁶ In this vein, Martha Nussbaum, *Liberty of Conscience in Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008) pp. 168–169.

²⁷ Michael W. McConnell, “God is Dead and We Have Killed Him! Freedom of Religion in the Post-Modern Age,” in *Brigham Young University Law Review* (1993) 163, 165.

public sphere becomes the most promising proposal for not dividing society. Indeed, if conflicts of faith undermine political cohesion, according to the liberal approach, restrictions of religious argumentation in the public sphere are unproblematic.

Over the last five decades, American law has become so fluctuating, divided, and uncritical in the application of principles and rules in religious matters, in part because the Supreme Court has definitively abandoned the religious approach without fully embracing the liberal approach. For several decades, the U.S. Supreme Court upheld states' constitutional obligations to accommodate conscientious objections to general applicable laws. The Court then changed its approach, but it continues to hold that accommodations are permissible when they are provided by the legislatures.²⁸ The Court is haphazardly moving from accommodationism to separationism, but also from strict neutralism to evenhanded neutralism or benevolent neutralism;²⁹ ultimately, it is progressively reducing religion to "a private matter for the individual, the family, and the institutions of private choice."³⁰ Emblematic of this inconsistency is the public display of the Ten Commandments on state property. On June 27, 2005, in *Van Orden v. Perry*,³¹ the U.S. Supreme Court ruled that the display of the Ten Commandments at the Texas State Capitol in Austin was constitutional and did not violate the Establishment Clause of the First Amendment. But in a similar case, *McCreary County v. ACLU of Kentucky*,³² released the very same day, the Court ruled the other way: that two displays of the Ten Commandments – at Kentucky county courthouses – were unconstitutional.³³ Examples of this judicial zigzagging abound.³⁴

With different nuances, we can make similar charges against the European Court of Human Rights. The inconsistency of the Strasbourg Court can be attributed to the large number and diversity of European constitutional models or perhaps to the fact that European jurisprudence is in a transitional phase. Or to the lack of a European blueprint on these matters, or to the European Convention on Human Rights being understood as a living instrument.³⁵ In any case, I believe such

²⁸ For a good overview, see Andrew Koppelman, *Defending American Religious Neutrality* (Cambridge, MA, London: Harvard University Press, 2013) esp. pp. 78–119.

²⁹ For a good explanation of these doctrines, see John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment* (3rd ed., Boulder, CO: Westview Press, 2011) pp. 169–189.

³⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

³¹ *Van Orden v. Perry*, 545 U.S. 677 (2005).

³² *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).

³³ The "swing vote" in both cases was Justice Stephen Breyer.

³⁴ In 1983, the U.S. Supreme Court upheld the constitutionality of state legislative chaplains (*Marsh v. Chambers*, 463 U.S. 783, 1983) because of the "unique history" of the United States, and two years later, in *Wallace v. Jaffree* (472 U.S. 38, 1985), the Supreme Court of the United States extended the firm prohibition against prayers in public schools to prohibit moments of silence as well for "meditation or voluntary prayer."

³⁵ In the same vein, see Jim Murdoch, *Protecting the Right of Freedom of Thought, Conscience, and Religion under the European Convention of Human Rights* (Strasbourg: Council of Europe, 2012) esp. pp. 7 and 83.

inconsistency is (also) often based on the existence of two different conceptions of religious freedom: (a) an accommodationist model that puts the human person at the center of the legal system, and (b) a strict-neutrality model that puts the political community at the center.³⁶ This duplicity produces unpredictable judicial decisions. The Court occasionally emphasizes (a) the so-called “margin of appreciation,”³⁷ which highlights the absence of a single European model, (b) a preference for a particular secular separatist-state model,³⁸ and (c) new standards and criteria (e.g., that the right to express religion may be restricted to preserve the conditions of “living together”³⁹).

In *Lautsi and Others v. Italy*, the Court declared that having crucifixes in public schools in Italy did not violate the Convention, arguing that arrangements in education and teaching may simply reflect historical traditions and dominant religious practice.⁴⁰ In *Leyla Sahin v. Turkey*, however, the Court banned the wearing of Islamic headscarves at Turkish universities and other educational state institutions, based on the principle of secularism.⁴¹ In *Dahlab v. Switzerland*, the Court upheld the government’s right to require a teacher who had converted to Islam to remove her headscarf, given that it was a powerful external symbol that could influence young children.⁴² In some ways, these two approaches to religious freedom are the European heirs of the liberal and religious approaches being discussed here.

³⁶ See Neal Butha, “Two Concepts of Religion in the Strasbourg Court,” in *The South Atlantic Quarterly* 113 (2014) 9–35.

³⁷ See for instance the judicial decision of the European Court of Human Rights in the case *S.A.S v. France*, Appl. No. 43835/11, Grand Chamber, 1 July 2014, that held that the so-called *French burqa ban* did not violate the European Convention on Human Rights (ECHR). The Court emphasized that, since it constitutes a choice of society, France had “a wide margin of appreciation” in relation to the question of whether wearing the full-face veil in public should be permitted.

³⁸ See Ian Leigh, “The European Court of Human Rights and Religious Neutrality,” in *Religion in a Liberal State* (ed. Gavin D’Costa, Malcolm Evans, Tariq Modood and Julian Rivers, Cambridge, New York: Cambridge University Press, 2013) p. 62.

³⁹ *S.A.S v. France*, Appl. No. 43835/11, Grand Chamber, 1 July 2014, para 115, 121–122, 153. In this case, the European Court of Human Rights held that prohibiting the concealment of a person’s face in public did not violate the European Convention on Human Rights.

⁴⁰ *Lautsi v. Italy*, Appl. No. 30814/06, Grand Chamber, 18 March 2011. In this case the European Court of Human Rights ruled that the requirement in Italian law that crucifixes be displayed in classrooms of state schools does not violate the European Convention on Human Rights. By this final judgment, the Grand Chamber overturned a unanimous judgment rendered on November 3, 2009, by the Second Section of the Strasbourg Court, that had declared the crucifix to be incompatible with the principle of secularism and the respect owed to parental convictions as protected by article 2, protocol 1, ECHR. For a commentary, see Grégor Puppinc, “The Case of *Lautsi v. Italy*: A Synthesis,” in *Brigham Young University Law Review* (2012) 873–930; Dimitrios Kyritsis and Stavros Tsakyrakis, “Neutrality in the Classroom,” in *International Journal of Constitutional Law* 11 (2013) 200–217; Lorenzo Zucca, “*Lautsi*: A Commentary on a Decision by the ECtHR Grand Chamber,” in *International Journal of Constitutional Law* 11 (2013) 218–229; J. H. H. Weiler, “A Reply,” in *International Journal of Constitutional Law* 11 (2013) 230–233.

⁴¹ *Leyla Sahin v. Turkey*, Appl. No. 44774/98, Grand Chamber, 10 November 2005 (2007) 44 EHRR 5.

⁴² *Dahlab v. Switzerland*, Appl. No. 42393/98, 15 February 2001, ECHR 2001-V.

In this book I defend a third way for secular legal systems to approach religion. I offer what we might call a theistic secular approach. It is far from the original religious approach, as I do not base it on religious arguments, but also far from the dominant liberal approach. My approach is religious, but my argument secular. The starting point of any consistent reconstructive legal approach to religious issues is the recognition that God, religion, and morality affect legal systems in different ways; therefore, they should be treated differently by the law. Although related, they are not definitionally linked; thus, they can be treated in different ways by secular legal systems. My critique of the religious and liberal approaches is that both treat God, religion, and morality from a legal perspective as a single reality. The religious approach focuses its best efforts on God, arguing that God is an ultimate source of morality and religion. The liberal approach focuses most on morality, arguing that God and religion are products, even if positive, of individual morality. The religious approach fails because it requires appeal to God in legal justifications, in a society in which believing in God is no longer axiomatic. The liberal approach fails because it closes the door to the Abrahamic religions, specifically to God as understood in these religions, by reducing religion to a private matter of conscience.

The recognition of God as what I call a *metalegal concept* is the topic of Chapter 1. My argument there is that secular legal systems can acknowledge God without undue favoritism or prejudice against religion in general, or any particular religion. The recognition of God as a *metalegal concept* enables the state to use the name of God in legal documents and invoke him in the public sphere without violating proper religious neutrality. God, we can say in American legal terminology, is beyond the reach of the First Amendment's establishment clause.

By "God" I mean the most fundamental, profound, basic, uncreated, and original reality. God is God. He is a living God, not just a simple construction of the mind. He is a unique and infinite Supreme Being, creator and sustainer of the universe, and ultimate source of morality. He is the wholly Other, the perfectly good, and the absolute ground of everything. He is a personal being, but is neither anthropomorphized nor otherwise limited. He is neither male nor female, but both man and woman are in his image. He is omnipotent, omniscient, and omnipresent, but not spatially extended, for he has no body. This is the idea of God as understood by the Abrahamic religions, other forms of transcendent monotheism, and even some kinds of deism. He is the God whose existence was assumed by political society for centuries. I respect and appreciate other approaches and forms of belief about the existence (or nonexistence) of God,⁴³ god, and gods, but in my opinion, a personal and unique God has a particular legal relevance that cannot be ignored by Western secular legal systems.

⁴³ See, among others, Richard Dawkins, *The God Delusion* (Boston: Houghton Mifflin, 2006); Christopher Hitchens, *God Is Not Great. How Religion Poisons Everything* (New York: Hachette Book, 2007); Greg M. Epstein, *Good without God* (New York: Harper, 2010).