THE PROTESTANT (DIS)ESTABLISHMENT: ITS OVERLOOKED ROLE IN THE ONGOING BATTLES OVER RELIGIOUS LIBERTY (A PROSPECTUS)

NOMI MAYA STOLZENBERG[†]

When I was a kid, we all learned that antidisestablishmentarianism was the longest word in the English language.[1] This fun fact was repeated without any expectation that we would understand what the word meant. Both antidisestablishmentarianism and its implied negative, disestablishmentarianism, were terms devoid of meaning for us, little more than gobbledygook, verbal fossils of obscure positions we apparently had no need to know.

When I was growing up in the 1960s and '70s, people also talked about "the Establishment." And when they did, they knew what it meant: the ruling class in America, made up of White Anglo-Saxon Protestants—WASPS as they had only recently come to be called,[2] though this group's existence as an identifiable, hereditary elite was traceable all the way back to the original English settlers, as proudly proclaimed by membership organizations and directories like the Social Register.[3] Descendants of the original Dutch settlers of the colonies also were a part of this hereditary elite, which was commonly referred to, more or less interchangeably, as the Eastern or Northeast Establishment, the Liberal Establishment, or, most significantly, the Protestant Establishment.[4]

1. In point of fact, it is only the fourth longest word according to Shundalyn Allen, *14 of the Largest Words in English*, GRAMMARLY (June 21, 2023), https://www.grammarly.com/blog/14-of-the-longest-words-in-english/ [https://perma.cc/WT73-G62R].

2. The use of the term "WASP" is generally traced to E. DIGBY BALTZELL, THE PROTESTANT ESTABLISHMENT: ARISTOCRACY AND CASTE IN AMERICA (1964); *See* Fred Shapiro, *The First WASP?*, N.Y. TIMES (Mar. 14, 2012), https://www.nytimes.com/2012/03/18/books/review/the-first-wasp.html [https://perma.cc/Y5L7-987M].

3. *See* JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSIONS AND EXCLUSION AT HARVARD, YALE AND PRINCETON 24–25 (2005) ("Among the upper class institutions that either were invented or came to prominence in the 1880s and 1890s [was] the *Social Register* (its first edition was published in New York City in 1888).").

4. The popularization of the term "the Protestant Establishment" also derives from Baltzell's 1964 book. *See* BALTZELL, *supra* note 2. The term "liberal establishment" came to be used in the same time period to describe the "governing class . . . in America" that "labors to make the ideas of Liberalism supreme in our politics, and [whose] members do work in concert although not necessarily by pre-arrangement." EVANS M. STANTON, THE

I say most significantly because, for purposes of understanding the never-ending battles over the meaning of the Free Exercise and Establishment Clauses, the Protestant character of what was then known as "the Establishment" is essential to understanding the revolt against the Establishment that took place in the 1960s and '70s, a revolt which has succeeded in profoundly reshaping the interpretation of the First Amendment and the principles of religious liberty and disestablishment which it enshrines. That revolt was, to be sure, a variegated thing, made of multiple movements, each of which had multiple motivations, agendas, targets, and constituencies. In the turbulent years of the sixties and early seventies, the most visible anti-Establishment movements were associated with the left.[5] But the most enduring anti-Establishment forces from that time period, the ones that in our day are succeeding in toppling positions long associated with the liberal Establishment, are those that gathered on the right.[6] These are forces that were animated as much by philosophical and cultural antipathies as by material interests and class resentments. More specifically, these are forces that were animated by *religious* objections to the positions associated with the Establishment. These objections go to the Establishment's Protestant character as much as to its liberal character. To be precise, they are religious objections to its liberal Protestant character—to its liberal Protestant theology and the general

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LIBERAL ESTABLISHMENT 15 (1965). The term was often used derisively. *See, e.g.*, John Schaar & W. Carey McWilliams, *Uncle Sam's Stepchildren: The New American Right,* 6 THE ACTIVIST 7 (1965) (associating the liberal Establishment with "the New Deal, Welfarism, violence in the streets, "one-worldism," co-existence, and immorality"); Norman Mailer et al., *We Accuse: A Powerful Statement of the New Political Anger in America, as Revealed in the Speeches Given at the 36-Hour "Vietnam Day" Protest in Berkeley, California*, DIABLO PRESS, 1, 2 (1965) (describing Berkeley students' exercise of freedom of expression in opposition to the Vietnam war as a "[release] from . . . conformist pressures" and an alternative "to the totalitarian policy of the Liberal Establishment."). In the 1960s, the terms "Eastern Establishment" and "Northeastern Establishment" also became synonymous with the "liberal Establishment." Ross R. Rice, *The 1964 Elections in the West*, 18 W. POL. Q. 431, 431 (1965); *see, e.g.*, Erving Crespi, *The Structural Basis for Right-Wing Conservatism: The Goldwater Case*, 29 PUB. OP. Q. 523, 524 (1965) ("Small-business men, Western *nouveaux* riches, and upwardly mobile Catholics, united by antagonism toward communism and involvement in world affairs, accepted McCarthy as their spokesman in an attack on the Eastern establishment and its policies.").

5. ALAN ADELSON, SDS (1972); TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS AND RAGE (1987); ROGER KIMBALL, THE LONG MARCH: HOW THE CULTURAL REVOLUTION OF THE 1960S CHANGED AMERICA (2000); Louis Menand, *The Making of the New Left*, THE NEW YORKER, (Mar. 15, 2021).

6. LAURA JANE GIFFORD & DANIEL K. WILLIAMS, THE RIGHT SIDE OF THE SIXTIES (2012); AXEL R. SHÄFER, COUNTERCULTURAL CONSERVATIVES: AMERICAN EVANGELICALISM FROM THE POSTWAR REVIVAL TO THE NEW CHRISTIAN RIGHT (2011).

cultural outlook produced by that theology, which, by the early twentieth century, was fast becoming the dominant outlook of the dominant class.

On the face of it, it may seem preposterous to claim that religious conservatives are, still, motivated by antipathy to liberal Protestantism and the Liberal Protestant Establishment. Sure, back in the day, conservative Protestants were opposed to liberal Protestantism and so, obviously, were conservative—and, for that matter, many non-conservative—Catholics.[7] But today? Who even remembers "the Protestant Establishment," let alone its religious perspective (if it even had one)? The days when WASPs ruled the land are long gone, and the social divisions that separated upper and upper middle class "mainline" Protestants from lower class "non-mainline" Protestants,[8] as well as from Catholics and Jews, while not eradicated, no longer are salient. The religious dividing lines that are significant now are those that separate Christian conservatives (a coalition that includes Catholics *and* Protestants, plus a smattering of Eastern Orthodox Christians) from non-conservative "secularists" or "liberals" (a grouping that includes many practicing as well as non-practicing Catholics and Protestants, along with liberal Jews and people from other non-Christian faith traditions, as well as people with no faith tradition at all); or the line that separates liberals and secularists from "religious conservatives," a broader grouping than Christian conservatives that embraces Mormons, Orthodox Jews and, more episodically, Muslims, Hindus, and people of other non-Christian faiths who, intermittently, share some of the values (in particular, traditional "family values") of the Christian conservatives who remain at the helm of this broad-based

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7. For theologically-minded Catholics, the denunciation of liberal Protestantism was part of a more sweeping denunciation of religious modernism, which also includes "ecclesiastical liberalism," i.e., liberal Catholicism, which is itself regarded as the adulterated product of efforts by nineteenth-century Catholic reformers to bring Catholicism into accordance with "anti-ecclesiastical Protestant theory" and "the atheistical 'science and enlightenment' prevailing at the time." Herm. Gruber, *Liberalism: Free Way of Thinking and Acting in Private and Public Life*, CATHOLIC ANSWERS, https://www.catholic.com/encyclopedia/liberalism [https://perma.cc/QHZ2-LDTH]. On the Catholic left's critique of liberalism, *see generally* Sara Mayeux, *"Make All the Laws You Want": The Catholic Left Against Legal Liberalism, Circa 1968*, 38 J.L. & RELIGION 189 (2023).

8. On the distinction between mainline and non-mainline Protestants, *see* William McKinney, *Mainline Protestantism 2000*, 558 ANNALS AM. ACAD. OF POL. SOC. SCI. 57, 59, 62 (1998) (describing the split between mainline and non-mainline Protestant as "a division over the degree to which churches ought to accommodate to cultural changes"); *see also* David Bains, *The Beliefs and Practices of Mainline Protestants, in* THE FUTURE OF MAINLINE PROTESTANTISM IN AMERICA, 59–82 (James Hudnut-Beumler & Mark Silk eds., 2018); Daniel Sack, *A Divided House, in* THE FUTURE OF MAINLINE PROTESTANTISM IN AMERICA 106–38 (2018).

coalition;[9] or the features that supposedly differentiate white Christians from—well, from whom is never quite clear.[10]

The haziness of the character of the "other" from which white Christians are differentiated reflects the more general haziness of the religious character of that group's own transdenominational identity and the even greater haziness of the religious or non-religious identity of its targets. Something similar is afoot with the identity category of "conservative Christian," which likewise submerges the denominational and sociological differences *among* Christians—and among *white* Christians—that once loomed large, while bringing ideological differences to the fore. While by no means identical (plenty of non-whites subscribe to conservative Christian beliefs), what the categories of conservative Christian and white Christian have in common is a least-common-denominator approach to defining Christian values and identity that subsumes different Christian denominations under the broad umbrella of theological conservatism.

What they also have in common is a tendency to lump everyone else into a single group with a shared identity and set of values. But the religious, or non-religious, character of the group and the outlook to which conservative Christians are opposed is deeply obscure. While "the Christian right" and the broader "religious right" are clearly recognized as religious, social, and political forces, their real and imagined antagonists are not commonly thought of as constituting a group with a religious outlook. Instead, the division is commonly presented as a battle between "the religious" and those with a non-religious mindset, often referred to—albeit chiefly by its opponents—as "secular humanism."[11] This framing,

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9. For a telling example of Muslim participation in a religious liberty campaign led by Christian conservatives, see Asma Uddin's contribution to this symposium. Asma T. Uddin, *Religious Identity Capitalism*, 70 WAYNE L. REV. 309 (2024).

10. Non-white Christians? Non-white non-Christians? White non-Christians? Non-Christians of any race? Non-whites of any religion? The fact that any and all of these could be the group from which "White Christians" are distinguished reflects the imprecision of the term.

11. As I have discussed previously, *see* Nomi Maya Stolzenberg, *"He Drew A Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 614 (1993), it is the rare individual who identifies herself as a secular humanist. But the term is a staple of conservative Protestant, Catholic, and Muslim discourse, where it is invariably used as a term of opprobrium. For examples of critiques of "secular humanism" in Catholic discourse, *see*, *e.g.*, John F. McCarthy, *The Challenge of the Year 2000*, ROMAN THEOLOGICAL FORUM No. 91(2001) (linking "the menace of sexual impurity" and "radical feminism" to "the philosophy of secular humanism," which is described as "an organized offensive against the Christian way of life," the "ultimate aim" of which is "to erase from civil law all of the norms of natural and Christian morality which underpin it and to substitute for these norms a bogus paradise of morally illicit but legally permitted erotic pleasure"); Catholic News Service, *In new biography, Pope*

Benedict says world threatened by humanism, CATHOLIC REGISTER (May 4, 2020), https://www.catholicregister.org/home/international/item/31548-in-new-biography-pope-benedict-says-world-threatened-by-humanism [https://perma.cc/7JGJ-2WXT] (Pope Benedict said that the Catholic Church is threatened by a "worldwide dictatorship of seemingly humanist ideologies."); MAUREEN EILEEN SULLIVAN, THE CHRISTIAN HUMANISM OF PAUL VI: ITS CHRISTOLOGICAL FOUNDATIONS 119–20 (1985) (Ph.D. dissertation, Fordham University) (ProQuest) (describing Pope Paul VI's disapproval of a humanism that lacks God); *Address of Pope Paul VI During the Last General Meeting of the Second Vatican Council*, https://www.vatican.va/content/paul-vi/en/speeches/1965/do cuments/hf_p-vi_spe_19651207_epilogo-concilio.html, [https://perma.cc/WY25-AT7F], Dec. 7 1965 (describing "Secular humanism, revealing itself in its horrible anti-clerical reality"); *see also*, *Address of Pope Francis to Participants in the Pilgrimage From the Diocese of Brescia* (June 23, 2013) https://www.vatican.va/content/francesco/en/ speeches/2013/june/documents/papa-francesco_20130622_pellegrinaggio-diocesi-brescia .html [https://perma.cc/45QB-NV7Z] (quoting Pope Paul VI's reference to "secular humanism, revealing itself in its horrible anti-clerical reality"). For the use of "secular humanism" in Protestant discourse, *see* HOMER DUNCAN, SECULAR HUMANISM: THE MOST DANGEROUS RELIGION IN AMERICA (1979) (warning, as the founder of the Missionary Crusader Press, which publishes religious booklets on the Christian faith from a Fundamentalist Baptist view, that "Secular Humanism is the most dangerous religion in America." Duncan also quotes Tim LaHaye, a prominent Evangelical minister, saying that "[h]umanism is the greatest threat the church has ever faced!"); TIM LAHAYE, THE BATTLE FOR THE MIND: A SUBTLE WARFARE (1980) ("[U]nless our nation's leaders and . . . American citizens become aware of the truth about humanism, it will ultimately lead to anarchy, and our culture will be destroyed."); FRANCIS A. SCHAEFFER, ADDRESS AT THE CORAL RIDGE PRESBYTERIAN CHURCH: A CHRISTIAN MANIFESTO (1982) (describing humanism as "the real reason for the breakdown in morals in [the United States]); FRANCIS A. SCHAEFFER, HOW SHOULD WE THEN LIVE? THE RISE AND DECLINE OF WESTERN THOUGHT AND CULTURE (1976). Conservative Christian discourse often depicts secular humanism and Islam as twin evils. *See e.g.*, David Noebel, *Worldviews In Collision*, SUMMIT (June 8, 2007) https://www.summit.org/resources/articles/worldviews-in-collision/ [https://perma.cc/YY7R-YZHE] ("Islam will ultimately triumph as Secular Humanism continues to marginalize God, Christ and Christianity."). Yet examples of Muslim discourse excoriating secular humanism abound. *See e.g.,* Sh. Suleiman Hani, *Secular Humanism and Islam: Conflicting Worldviews*, THE MESSAGE MAGAZINE, (Nov. 16 2022) https://messageinternational.org/secular-humanism-and-islam-conflicting-worldviews/ [https://perma.cc/DV6B-E5EA] (repudiating secular humanism on the ground that "[o]bjective morality cannot be established by human beings alone" and asserting that secular humanism conflicts with Islam, while acknowledging that "Secular humanism and Islam can surely agree that seeking truth is good, that living a moral life is good, and that having meaning and purpose in life is good"); Patricia Crone, *The Qurʾānic Pagans and Related Matters: Collected Studies in Three Volumes, in* 156 LEIDEN, THE NETHERLANDS: BRILL. 417–418 (2016) (describing Sayyid Qutb, one of the premier Islamists of the 20th century, as denouncing secularism as an inherently "oppressive system" since it sabotages freedom of religion by confining religion to the private realm.). Polemics against secular humanism are considerably less prominent in Jewish discourse, but isolated examples do exist, mostly in the sphere of conservative magazines and radio talk shows. *See* Irving Kristol, *The Future of American Jewry*, COMMENTARY, Aug., 1991, https://www. commentary.org/articles/irving-kristol/the-future-of-american-jewry/ [https://perma.cc/ 7LWC-AZGP] (describing secular humanism as "the religious basis of socialism" and asserting that "[a]s the spirit of secular humanism loses its momentum, it is reasonable to

which makes religious faith appear to be an essential feature of only one side of the culture wars, makes it hard to see how the other side is connected to liberal Protestantism or to any religious point of view. Indeed, on the common understanding, secularism is the very antithesis of a religious philosophy or belief-system. So, too, with the other "isms," i.e., liberalism, leftism, and "wokeism," that conservative religious discourse identifies as its philosophical foes. And so, too, with the more specific issues, e.g., abortion, same-sex marriage, trans rights, or the latest bogeyman, critical race theory, that conservative discourse targets. None of these particular targets, nor the more general philosophical perspectives against which religious conservatives take aim, seem to bear a religious character, let alone a specifically liberal Protestant character. On the contrary, they bear a secular character.

But, as historians of the intellectual origins of liberalism and secularism have shown (and as conservative theologians understand full well), these political philosophies and cultural outlooks *derive* from Christian political theologies.[12] More specifically, they derive from the

anticipate that religion will play a more central role in American life"); PragerU, *Dennis Praeger Debunks the Absurd Ideas of Secularism*, FACEBOOK, https://www.facebook.com/watch/?v=624692029421200 [https://perma.cc/BZ6K-RBWA]. *See also* Mathilde Frot, *Chief Rabbi: Humanists 'seek out oppportunities to attack' Judaism*, JEWISH NEWS (Sept. 18, 2019, 1:05 PM), https://www.jewishnews.co.uk/chief-rabbi-humanists-seek-out-opportunities-to-attack-judaism/ [https://perma.cc/5W9F-ULWT] (describing a speech delivered by Rabbi Ephraim Mirvis, Chief Rabbi of the UK and former Chief Rabbi of Ireland, distinguishing between an 'us,' Jews, and a 'them,' humanists.); NAOMI W. COHEN, NATURAL ADVERSARIES OR POSSIBLE ALLIES? AMERICAN JEWS AND THE NEW CHRISTIAN RIGHT, 15 AMERICAN JEWISH COMMITTEE MONOGRAPH SERIES (1993) ("One Orthodox rabbi explained that '"You can't be ultraliberal or humanist and a Jew at the same time."'"); Rabbi Zalman Baruch Melamed, *Wipe Out Amalek*, YESHIVA https://www.yeshiva.co/midrash/1329 [https://perma.cc/Y2WE-DDBW] (explaining that those with "humanistic leanings have a hard time grappling with" the commandment to "blot out the memory of Amalek"); Rabbi Jonathan Sacks, *The Faith of God*, YESHIVA, https://www.yeshiva.co/midrash/36581 [https://perma.cc/VPW4-8AX2] ("Humanism did not make men human.").

12. *See generally* WILLSON H. COATES, HAYDEN V. WHITE & J. SALWYN SCHAPIRO, THE EMERGENCE OF LIBERAL HUMANISM: THE INTELLECTUAL HISTORY OF WESTERN EUROPE, Vol. 1 FROM THE ITALIAN RENAISSANCE TO THE FRENCH REVOLUTION (1966); AMOS FUNKENSTEIN, THEOLOGY AND THE SCIENTIFIC IMAGINATION: FROM THE MIDDLE AGES TO THE SEVENTEENTH CENTURY (1989); KATHY EDEN, HERMENEUTICS AND THE RHETORICAL TRADITION: CHAPTERS IN THE ANCIENT LEGACY AND ITS HUMANIST RECEPTION (1998); JEREMY WALDRON, GOD, LOCKE AND EQUALITY: CHRISTIAN FOUNDATIONS OF LOCKE'S POLITICAL THOUGHT (2002). I discuss the Christian tradition of secularist humanist thought in a series of articles including Nomi Stolzenberg, *The Profanity of Law*, *in* LAW AND THE SACRED (Austin Sarat, Lawrence Douglas, & Martha M. Umphrey, eds., 2007); Nomi M. Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041 (2010); Nomi M. Stolzenberg, *Political Theology With a Difference*, 4 U.C. IRVINE L. REV. 407 (2014); Nomi M. Stolzenberg, *The Return of Religion*, *in* THE HANDBOOK OF LAW AND SOCIETY (Austin Sarat & Patricia Ewick eds,. 2015); Nomi M.

humanist tradition of Christian political thought and from parallel traditions of Jewish thought which, at crucial points in U.S. history and at earlier points in European history, intersected with Christian humanist thought to produce the dominant strains of political theory and social values to which most "modern" people (as opposed to anti-modernist "traditionalists") subscribe.[13] Much of modern history is the story of how these political outlooks, which include the Marxist offshoots of dialectical humanism as well as liberalism in all of its variety, became widely embraced—by educators and scholars, by scientists and intellectuals, by artists and activists, by religious and political leaders, by professionals and business leaders, and by ordinary people. Whether or not people who share these outlooks today think of them as religious outlooks (some do, more don't), their religious opponents rightly recognize them as latter-day expressions of a theological tradition they despise.

The project described in this essay takes that perception seriously. It aims to make the content of this theological tradition more perspicuous and, in so doing, attain a better understanding of how the longstanding battle between its proponents and its opponents has shaped and reshaped the doctrine of the Establishment and Free Exercise Clauses of the First Amendment—and how the humanist tradition might be harnessed to reshape the doctrine yet again. At the same time, it emphasizes that the abstract ideas associated with the humanist tradition of theology were adopted and implemented in particular places and times by particular groups of people who embodied them in particular educational, political, social, and legal practices and institutions. To borrow a term from religious studies, which stresses the need to understand "lived religion," not just religious doctrines and the decrees of religious leaders but religion as it is practiced by ordinary people in everyday life,[14] so, too, we need to

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Stolzenberg, *From Eternity to Here: Divine Accommodation and the Lost Language of Law*, *in* THE OXFORD HANDBOOK OF LAW AND HUMANITIES (Simon Stern, Maksymilian Del Mar, & Bernadette Meyler eds., 2019).

13. On the parallel tradition of Jewish humanist theological and political thought and on the intersections between Jewish and Christian humanist and secularist thought, *see* JONATHAN I. ISRAEL, REVOLUTIONARY JEWS FROM SPINOZA TO MARX: THE FIGHT FOR A SECULAR WORLD OF UNIVERSAL AND EQUAL RIGHTS (2021); FUNKENSTEIN, *supra* note 12; MENACHEM LORBERBAUM, POLITICS AND THE LIMITS OF LAW: SECULARIZING THE POLITICAL IN MEDIEVAL JEWISH THOUGHT (2002); Suzanne Stone, *Religion and State: Models of Separation From Within Jewish Law*, 6 I-CON 631 (2008); Nomi M. Stolzenberg, *Jewish Legal Theory?*, 112 JEWISH Q. REV. 636 (2022).

14. On the concept of "lived religion," *see* Robert Orsi, *Everyday Miracles: The Study of Lived Religion, in* LIVED RELIGION IN AMERICA (David D. Hall, ed., 1997); NANCY T. AMMERMAN, STUDYING LIVED RELIGION: CONTEXTS AND PRACTICES (2021); MEREDITH B. MCGUIRE, LIVED RELIGION: FAITH AND PRACTICE IN EVERYDAY LIFE (2008); NANCY TATOM, EVERYDAY RELIGION: OBSERVING MODERN RELIGIOUS LIVES (2006).

understand the "lived theologies" of humanism and of anti-humanism as they have played out in particular social and political contexts, with the focus here being on how the battle between these two theologies has unfolded in the United States. Doing so allows us to come to terms with the way in which this theological battle has been embedded in a social system characterized by various forms of material and social inequality, as well as by ethnic and racial differences. Then, and only then, can we begin to reckon with the complex interactions between these inequalities and the theological divisions that have historically tracked the social divides.

In this regard, it is important to remember that only some Protestants were included in the elite social grouping that composed "the Protestant Establishment." Not only were nonwhite Protestants excluded. Not all white Protestants, nor even all White Anglo-Saxon Protestants, were included; only ones of a particular type. That particular type was distinguished from other Protestants both by internal attitudes and beliefs and by external sociological markers, such as wealth and class, birth and background, manners and education, as well as by the cultural influence and political power wielded by upper class Protestants. It bears mention that there were always those who lacked the British or Dutch ancestry, the education, or the "old money" necessary to qualify as a member, but who nonetheless managed, despite their questionable pedigree, to make their way into this elite. There were even some non-Protestants to be found in America's ruling class, especially, though not only, in the South.[15] That said, the Establishment was undeniably overwhelmingly Protestant.[16] And the distinction between the Protestantism of the Establishment and that of Protestants who were not a part of the Establishment was as much a matter of religious beliefs and theology as it was a matter of the material and cultural differences that separated the upper from the lower classes (and that were emulated by those in the aspirational middle).

These theological differences between Establishment Protestants and non-Establishment Protestants were, in the first instance, the product of intellectual developments that occurred within Protestantism, the most visible manifestation of which was the "fundamentalist-modernist controversy" that broke out first in the American Presbyterian Church in

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15. The slaveholding Chief Justice Roger Taney would be a notable example. *See Roger Brooke Taney (1777-1864)*, ARCHIVES OF MD. (BIOGRAPHICAL SERIES), https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001500/001500/html/1500bio.html [https://perma.cc/DN95-7HPV].

16. BALTZELL, *supra* note 2. *See also* James D. Davidson, Ralph E. Peyles & David V. Reyes, *Persistence and Change in the Protestant Establishment*, *1930-1992*, 74 SOCIAL FORCES 157 (1995).

the 1920s and then spread to other Protestant denominations.[17] That controversy was the culmination of long-standing debates among Protestant theologians and other Protestant intellectuals over matters such as the divine authorship of the Bible, the acceptability of scientific theories that appeared to contradict the Bible, and the doctrine of original sin.[18] More directly political issues, such as the relationship of church authority to the state and to the individual, the proper treatment of people with different beliefs, and the question of whether all people are created equal (and, if so, who counts as a person and what rearrangements of our social institutions are necessary), in addition to liturgical matters, also were on the table.[19] All of these diverse issues were subsumed under the broader question of the validity of a "modernist"[20] approach to theology, which licenses adaptation to changing circumstances, in particular, changes in understanding owing to modern scientific discoveries and changes in attitudes owing to progressive moral beliefs. By the beginning of the twentieth century, more and more Christians were gravitating to a version of liberal Protestantism, which embraced the modernist approach.[21] Fundamentalism arose in response to this growing liberalization of the Protestant church[22] and of Protestant people. In the face of this liberalization, fundamentalism's proponents proudly employed that term

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17. BRADLEY J. LONGFIELD, THE PRESBYTERIAN CONTROVERSY: FUNDAMENTALISTS, MODERNISTS, AND MODERATES 4–5 (1991); James H. Moorhead, *Mainstream Presbyterians: Putting the Pieces Together Again After the Fundamentalist Controversy*, 86 J. PRESBYTERIAN HIST. 71 (2008); GEORGE M. MARSDEN, FUNDAMENTALISM AND AMERICAN CULTURE: THE SHAPING OF TWENTIETH-CENTURY EVANGELICALISM (1980).

18. MARSDEN, *supra* note 17, at 4, 20; LONGFIELD, *supra* note 17, at 16, 201. *Cf.* Stolzenberg, *He Drew A Circle*, *supra* note 11, at 615-17 (1993) (describing the theological battle over the principle of biblical inerrancy).

19. Margaret Bendroth, *Religious Conservatism and Fundamentalism, in* THE COLUMBIA GUIDE TO RELIGION IN AMERICAN HISTORY 312 (Paul Harvey et al. eds., 2012).

20. *See* Edward J. Larson, *Fundamentalists Battle Modernism in the Roaring Twenties, in* MAJOR PROBLEMS IN AMERICAN HISTORY, VOL. II, 217–18 (Elizabeth Cobbs Hoffman & Jon Gjerde, eds. 2017) ("The culprit, [all non-mainline Protestants] agreed, was a form of theological liberalism known as 'modernism' that was gaining acceptance within most mainline Protestant denominations.").

21. GENE ZUBOVICH, BEFORE THE RELIGIOUS RIGHT: LIBERAL PROTESTANTS, HUMAN RIGHTS, AND THE POLARIZATION OF THE UNITED STATES (2022).

22. More precisely, it was churches, plural, that were undergoing liberalization, as Protestantism consists of multiple denominations, within which individual congregations enjoy considerable autonomy. Growing liberalization went hand in hand with increasing lay control over churches and growing respect within many Protestant congregations for the autonomy of the individual. *See* Sarah B. Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 315 (2014); *see, e.g.*, Act of Mar. 16, 1786, § 1, 1785-1786 N.J. ACTS ch. 129, § 1, at 25 (requiring religious societies to elect a maximum of seven trustees); Act of Apr. 5, 1813, § 1, 3 N.Y. REV. STAT. 292, 292–93 (1829) (limiting the vote of trustees).

as a way to signify their commitment to what they regarded as "the five fundamentals," to wit, the inerrancy of scripture, belief in the virgin birth of Christ, belief in "the substitutionary atonement of Christ," (i.e., that Jesus died for our sins), belief in Christ's bodily resurrection, and belief in Christ's miracles (*contra* the scientific debunking of the reality of miracles implied and sometimes actively promoted by the more rationalist approach of liberal Protestantism).[23]

The debate over these issues, which was both intense and protracted, was mainly conducted by members of the clergy, theologians, and other intellectuals, and it drove a wedge inside the Presbyterian Church. Some Presbyterian congregations adopted the fundamentalist position, while others continued their drift towards increasing modernization and liberalization.[24] Other Protestant denominations underwent similar splits, resulting in the creation of two separate camps, a distinction that cut across Protestant denominational differences and reached well past the clergy and thought leaders to encompass the laity and everyday religious life.[25] The so-called mainline churches, including the Episcopal Church, the United Church of Christ, and others of the so-called "Seven Sisters of Protestantism" favored by the Protestant upper and aspirational classes,[26] tended to adopt the "modern" views about such matters as the divine authorship of the Bible, evolution, and the doctrine of original sin.[27] Non-mainline denominations, a category that includes Southern Baptists, Pentecostalists, Seventh-day Adventists in addition to conservative Presbyterians, Methodists, and Lutherans and smaller groups like the Church of the Nazarene, vehemently opposed such modernizations. Each

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23. Bendroth, *supra* note 19, at 311 (internal quotation marks omitted).

24. LONGFIELD, *supra* note 17; Moorhead, *supra* note 17.

25. MARSDEN, *supra* note 17; Bendroth, *supra* note 19.

26. The largest of the mainline churches are the so-called Seven Sisters American Protestantism, including the Episcopal Church, the United Church of Christ, the United Methodist Church, the American Baptist Churches USA, the Evangelical Lutheran Church in America, the Christian Church (Disciples of Christ), and the Presbyterian Church. JASON LANTZER, MAINLINE CHRISTIANITY: THE PAST AND FUTURE OF AMERICA'S MAJORITY FAITH (2012).

27. Ralph C. Chandler, *The Wicked Shall Not Bear Rule: The Fundamentalist Heritage of the New Christian Right, in* NEW CHRISTIAN POLITICS (Robert C. Liebman & Robert Wuthnow, eds., 1984); DAVID A. HOLLINGER, AFTER CLOVEN TONGUES OF FIRE: PROTESTANT LIBERALISM IN MODERN AMERICAN HISTORY (2013); *Cf.* Stolzenberg, *supra* note 11, at 617 (*citing* David A. Rausch, *Fundamentalist Origins, in* FUNDAMENTALISM TODAY: WHAT MAKES IT SO ATTRACTIVE? (Marla J. Selvidge ed., 1984) and James A. Speer, *The New Christian Right and its Parent Company: A Study in Political Contrasts, in* NEW CHRISTIAN POLITICS (Robert C. Liebman & Robert Wuthnow, eds., 1984) (observing that "[b]y the turn of the [twentieth] century, the minority of evangelicals who opposed liberal Christianity had begun calling for a return to 'the fundamentals' of Christianity").

of these two camps maintained a solid membership and a robust culture, replete with their own educational and cultural institutions, social networks, news outlets, and popular forms of art and culture, as well as more highbrow forms of literature and social and religious commentary.[28] But, by the time the fundamentalist-modernist controversy drew to a close at the end of the 1920s, it was clear which group had the upper hand. Liberal Protestantism, henceforth associated with mainline Protestantism, won the hearts and the minds of the majority of the rising middle class and the upper class, which, as mentioned above, was predominantly WASP.[29] That WASP elite, otherwise known as "the Establishment," in turn imprinted its liberal Protestant outlook onto the political, cultural, and educational institutions they largely controlled. Meanwhile, fundamentalist opposition to liberal Protestant theology and resentment against elite institutions that promoted that theology continued to spread.

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28. For descriptions of the parallel system of cultural and educational institutions developed by the fundamentalist/conservative evangelical camp, see ROBERT WUTHNOW, THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II 173-191 (1988) (describing the formation of evangelical institutions, including "the National Association of Evangelicals," "the National Religious Broadcasting Association," "the National Sunday School Association," "the Evangelical Foreign Missions Association," "the Commission on War Relief (later renamed World Relief)," and a variety of educational and cultural institutions focused on youth outreach, such as "the Commission for Church Schools," "Youth for Christ," "the Child Evangelism Fellowship," "Children for Christ, Word of Life Fellowship, High School Evangelism Fellowship, Miracle Book Club, Youth Jubilee Hour, and Voice of Christian Youth," and campus organizations such as "Campus Crusade for Christ" "Inter-Varsity Christian Fellowship, Nurses Christian Fellowship (an outgrowth of Inter-Varsity), and Navigators"); JOEL CARPENTER, REVIVE US AGAIN: THE REAWAKENING OF AMERICAN FUNDAMENTALISM (1977) (discussing the National Association of Evangelicals (NAE), an institution whose mission was to "to provide a united voice and a cooperative clearing house for conservative Protestants," and various "collaborative ventures" which were "either founded or inspired" by the NAE, including the National Religious Broadcasters, the Evangelical Theological Society, the Evangelical Press Association, and the Evangelical Foreign Missions Association"); Joel Carpenter, *Fundamentalist Institutions and the Rise of Evangelical Protestantism, 1929-1942*, 49 CHURCH HISTORY 62, 62-75 (1980) (describing four areas of activity, namely, education, summer Bible conferences, radio broadcasting and foreign missions, which propelled the fundamentalist movement to new growth); Douglas A. Sweeney, *Evangelicals in American History*, *in* THE COLUMBIA GUIDE TO RELIGION IN AMERICAN HISTORY 122, 133-34 (Paul Harvey & Edward J. Blum eds., 2012) (describing the formation of the National Association of Evangelicals in 1942 and the subsequent formation "[i]n the 1940s and 1950s [of] dozens of other neo-evangelical institutions, some of them dwarfing their competitors in the mainline Protestant world," including "Christian radio," as well as "television, magazines, and best-selling books," as well as "colleges and seminaries to train their future leaders").

29. Bendroth, *supra* note 19, at 312 ("fundamentalists lost an important . . . battle. In ensuing decades, the movement settled into the American popular imagination as . . . rural, southern, and anti-intellectual.").

The self-proclaimed opponents of liberal Protestantism never ceased battling against what they regarded as a false religion. But that opposition increasingly took place on the margins, outside the cultural mainstream[30]—which only fueled the opposition's resentment of "the Establishment," which they held to be responsible for undermining traditional Christian values by promoting the culture of "secular humanism," and for lording it over people who lacked the accouterments of wealth and power that elite Protestants reserved for themselves.[31]

At the same time, although initially on a completely separate, parallel track, American Catholics nursed their own grievances not just against Protestantism, in general,[32] but more particularly, against the liberal Protestant Establishment.[33] As with conservative Protestants, Catholic umbrage at the Protestant Establishment was fueled by a combination of theological objections to the Protestant elite's liberal interpretations of Christian beliefs and class-based resentments.[34] Like Protestant

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30. Stolzenberg, *supra* note 11, at 619 (*citing* WALTER H. CAPPS, THE NEW RELIGIOUS RIGHT 10 (1990)) ("Virtually all of the textbook analyses confirm that the traditional stance of conservative or rightist religious groups in the United States is to opt for marginality.").

31. Stolzenberg, *supra* note 11, at 619 (*citing* Speer, *supra* note 28, at 29) (recounting how "[f]ollowing the debacle of the Scopes trial, … fundamentalists were shunned by mainstream academic institutions … and by more moderate evangelicals" and how, following the defeat of their effort to rid the liberals from their churches, "they withdrew and formed their own institutions.").

32. Lynn Dumenil, *The Tribal Twenties: "Assimilated" Catholics' Response to Anti-Catholicism*, 11 J. AM. ETHNIC HIST. 21, 31 (1991) ("Catholic leaders chafed against the Americanization efforts designed to homogenize American culture in the image of Anglo-Saxon Protestant.").

33. PETER R. D'AGOSTINO, ROME IN AMERICA: TRANSNATIONAL CATHOLIC IDEOLOGY FROM THE RISORGIMENTO TO FASCISM (2005) (describing American Catholics' resistance to American Protestantism and liberalism); *Catholic Discipleship in Liberal Protestant America*, THE CATHOLIC TELEGRAPH (Jan. 24, 2024), https://www.thecatholictelegraph. com/catholic-discipleship-in-liberal-protestant-america/94843 [https://perma.cc/L2RJ-6BHU] (warning about the dangers of Protestant liberalism, a "moral dialect that leads inevitably to failure" and expressing frustration that in order "[t]o be accepted by the liberal and Protestant American culture, [Catholics] unwittingly accepted the basic moral premises that formed that culture. In the process, [Catholics] forgot the theologies and practices that separate being Catholic from being a certain kind of American."). These twentieth-century diatribes echoed earlier Catholic polemics against liberalism as the product of Protestantism. *See* DON FELIX SARDA Y SALVANY, LIBERALISM IS A SIN 22 (1884) (arguing that liberalism, a direct result of Protestantism, is "the root of heresy, the tree of evil in whose branches all the harpies of infidelity find ample shelter; it is today the evil of all evils.").

34. On the theological dimension, i.e., Catholic objections to (liberal) Protestant theology, *see* KATHLEEN A. MAHONEY, CATHOLIC HIGHER EDUCATION IN AMERICA: THE JESUITS AND HARVARD IN THE AGE OF THE UNIVERSITY 10 (2003) (*citing* Michael V. Gannon, *Before and After Modernism: The Intellectual Isolation of the Catholic Priest, in* THE CATHOLIC PRIEST IN THE UNITED STATES: HISTORICAL INVESTIGATIONS (John Tracy

fundamentalists, Catholic leaders were especially exercised about the culture of intellectual modernism, nonsectarianism, and secularism promoted by liberal Protestant institutions, most notably by the historically Protestant colleges and universities that play such an outsized role in training and producing America's economic, political, social, and cultural elite,[35] and also by the public schools, which, despite their officially nonsectarian character, were, in many places (particularly in urban areas, where Catholic immigrants were concentrated), controlled by the Protestant Establishment.[36]

Ellis, ed., 1971)) (describing "the Papacy's hostile judgment on Protestant-inspired modernism [which] largely foreclosed Catholic engagement with the intellectual mainstream for most of the twentieth century."); R. SCOTT APPLEBY, CHURCH AND AGE UNITE! THE MODERNIST IMPULSE IN AMERICAN CATHOLICISM (NOTRE DAME STUDIES IN AMERICAN CATHOLICISM) (1992); MARGARET MARY REHER, CATHOLIC INTELLECTUAL LIFE: A HISTORICAL STUDY OF PERSONS AND MOVEMENTS (BICENTENNIAL HISTORY OF THE CATHOLIC IN AMERICA) (1989). On the interplay of theological and class-based factors, see the third chapter of Mahoney's book, titled *Persons: The Bonds of Religion and the Claims of Class, in* MAHONEY, *supra*, at 101-50.

35. On the Protestant character of America's elite colleges and universities, *see* GEORGE MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF (1996); THE SECULARIZATION OF THE ACADEMY (RELIGION IN AMERICA) (George M. Marsden & Bradeley J. Longfield, eds., 1992); MAHONEY, *supra* note 34; GEOFFREY KABASERVICE, THE GUARDIANS: KINGMAN BREWSTER, HIS CIRCLE, AND THE RISE OF THE LIBERAL ESTABLISHMENT (2004). On their outsized role in producing the political, culture and business elite, *see* KABASERVICE, *supra*. On Catholic objections to the Protestant—and liberal, nonsectarian, and increasingly secular—character of American colleges and universities, and the perception that liberal Protestant institutions of higher education were anti-Catholic, *see* MAHONEY, *supra* note 34, at 2, 24-25 (describing how liberal Protestantism and antipathy toward Catholicism "found concurrent expression at Harvard University" in 1893, when Harvard's president, Charles Eliot, announced a "new admissions policy at Harvard Law School that seemed to discriminate against graduates of Jesuit colleges" and reflected his "deep disdain for the Jesuits and their schools"); *id.* at 26 (describing the "tenacious" anti-Catholicism and anti-Jesuitism at Harvard); *id.* at 33-37 (explaining "Charles Eliot's fall from grace with many members of the Catholic community" that was precipitated by "the law school controversy."); *id.* at 48 (describing the efforts of "[e]arly Havardians … to stem the Roman tide"); *id.* at 58 (explaining that "[a]nti-Jesuit sentiment was deeply rooted in the Protestant consciousness," which university leaders such as Eliot had inherited); *id.* at 72-82, 92-96 (describing the battle waged by Catholic educators against the changes in Harvard Law School's admissions policy which resulted in excluding graduates of Jesuit colleges."). *But see id.* at 102 (noting the irony of "the emergence of a Catholic middle class whose propensity to emulate the Protestant middle class pulled many Catholics into the orbit of Protestant higher education," despite the objections of Catholic educational and religious leaders.).

36. For a detailed exploration of one such battle over nonsectarianism in Protestant-controlled public schools, *see* Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy 1840–1842*, 3 N.Y.U. J. L. & LIBERTY 267 (2008).

Of course, as we all know, at a certain point in the mid-twentieth century, the separate tracks on which Catholics and non-mainline Protestants ran intersected and then merged, creating the powerful coalition we now know as the Christian Right.[37] We know as well that, over time, this coalition expanded to include Mormons, adherents of the Eastern Orthodox Church, and Orthodox Jews, as well as admitting the occasional participation of members of other non-Christian faiths.[38] To

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37. Markku Ruotsila, *Carl McIntire and the Fundamentalist Origins of the Christian Right*, 81 CHURCH HIST. 378, 388–89 (2012); D. G. Hart, *Conservatism, the Protestant Right, and the Failure of Religious History*, 4 J. HIST. SOC. 447, 466–67 (2004). For more on the origins of America's Christian right, *see* DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT (2010); JEROME L. HIMMELSTEIN, TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM (1990); RANDALL BALMER, BAD FAITH: RACE AND THE RISE OF THE RELIGIOUS RIGHT (2021); WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA (1997); Michael Barkun, *Creating the Christian Identity, in* RELIGION AND THE RACIST RIGHT: THE ORIGINS OF THE CHRISTIAN IDENTITY MOVEMENT (1997); Molly Worthen, *The Theological Origins of the Christian Right, in* FAITHFUL REPUBLIC: RELIGION AND POLITICS IN MODERN AMERICA (2015).

38. On the relationship built between politically conservative Jews and the Christian right, *see* NAOMI W. COHEN, NATURAL ADVERSARIES OR POSSIBLE ALLIES? AMERICAN JEWS AND THE NEW CHRISTIAN RIGHT, 15 AMERICAN JEWISH COMMITTEE MONOGRAPH SERIES (1993) (explaining how certain segments of the Jewish community have united with the Christian Right over particular causes. For example, Orthodox Jews have supported the Christian Right's "measures against abortion and pornography," while others have "favored the Right's stand on foreign policy, particularly its commitment to the State of Israel and to a well-armed America."). *See also* GIFFORD & WILLIAMS, *supra* note 6, at 5 (describing the formation of "a new interreligious coalition of Catholics, Protestants, and Jews" that, during the 1960s, "began to acquire control of the Republican Party), *id.* at 11, 126-35 (describing how "a contingent of American Orthodox Jews abandoned their traditional belief in church-state separation and began to accept the idea that a state founded on Judeo-Christian principles could become a guardian of public morality, in the name of religion"), *but see id.*, at 127 (noting that "[n]othwithstanding their revulsion toward the radical 1960s, Orthodox Jews did not adopt the entire agenda of the Christian Right.") *See also* Clifford R. Goldstein, *Jews and the Christian Right*, LIBERTY (Mar. 2006), https://www.libertymagazine.org/article/jews-and-the-christian-right [https://perma.cc/6U PZ-5XDE] (analyzing the political alliance between American Jews and conservative evangelicals in support of Israel); Phil Zuckerman, *Jews and the Christian Right*, 73 J. JEWISH COMMUNAL SERV. 21, 26–27 (1996) (showing Conservative Jews and the Christian right seeing eye to eye on issues surrounding Israel); Jan Feldman, *Lubavitch and American Politics, in* LUBAVITCHERS AS CITIZENS: A PARADOX OF LIBERAL DEMOCRACY 42, 45 (2003) (explaining that "[f]or Orthodox Jews, the threat of an amoral culture, disorder, and lawlessness loomed larger than the threat of the de facto establishment of Christianity," and describing how "the Rebbe found himself on the same side of several issues as the Christian right, including: school prayer, a moment of silence, school funding, character education, and objections to sex education and Darwinian theories of evolution"); Michael Helfand, *Equal Funding as Equal Standing: The Orthodox Jewish Advocacy Project,* 3 SOURCES: A JOURNAL OF JEWISH IDEAS 122 (2023) (recounting how the American Jewish consensus over the value of "separationism" broke down over the issue of funding for

religious schools, leading to the emergence of a new form of Jewish legal advocacy—Orthodox legal advocacy—that pushed to include religious schools in public funding programs); Noah Feldman, *On the Separation of Yeshiva and State*, 13 JEWISH REVIEW OF BOOKS (2022) (arguing that Orthodox Jewish support for the inclusion of religious institutions in government funding programs reflects "the Orthodox alignment with Protestant evangelicals and conservative Catholics on a wide range of issues, from gay rights to family values to (some) foreign policy issues."). On the integration of Mormons into the Christian Right *see,* Anson Shupe & John Heinerman, *Mormonism and the New Christian Right: An Emerging Coalition?*, 27 REV. RELIGIOUS RSCH. 146 (1985) (describing the alliance between the rightwing and largely Mormon Freemen Institute and the Moral Majority that began to emerge in the 1980s, tracing both camps' ties to the John Birch Society and their convergence over social issues, such as abortion, pornography, and "the evils of so-called secular humanism, feminism, liberalism, and godless communism."); *see also* Merlin B. Brinkerhoff, Jeffrey C. Jacob & Marlene M. Mackie, *Mormonism and the Moral Majority Make Strange Bedfellows? An Explanatory Critique*, 28 REV. RELIGIOUS RSCH. 236 (1987) (expanding on the points of agreement between Mormons and conservative Christians on most socio-religious issues, although still understanding conservative Christians to have "manifest definite antipathy towards Mormons . . . which is not reciprocated by Mormons in the same degree of intensity."). On the relatively new and still quite small, but growing, phenomenon of Eastern Orthodox Christians joining the conservative Christian movement in America (and transnationally) and the converse phenomenon of Protestant and Catholic conservatives joining the Orthodox Church, see Jovan Tripkovic, *Columnist Rod Dreher Talks Orthodox Christianity and Nationalism*, RELIGION UNPLUGGED, October 28, 2022, https://religionunplugged.com/news/2022/10/28/qampa-rod-dreher-talks-orthodox-christianity-and-nationalism#:~:text=Rod%20Dreher%2C%20a%20senior%20editor,for%20Americans%20to%20look%20to [https://perma.cc/CUP4-QGXZ]; Sarah Ricardi-Swartz, *Conversions to Russian Orthodoxy Amid the Global Culture Wars*, Berkeley Forum (2019) https://berkleycenter.georgetown.edu/responses/american-conversions-to-russian-orthodoxy-amid-the-global-culture-wars [https://perma.cc/HU4U-R7E4] (analyzing the "ways socially conservative views of morality factor in the decision process for American converts to the Russian Orthodox Church Outside of Russia"); Pasquale Annacchino, *The Russian Orthodox Church and Global Religious Freedom*, Berkeley Forum (2019) https://berkleycenter.georgetown.edu/responses/the-russian-orthodox-church-and-global-religious-freedom [https://perma.cc/V4KE-AGF5](discussing the Russian Orthodox Church's emergence as "a major protagonist in conflicts over human rights, and among them of the right to religious freedom, criticism of the European Court of Human Rights for its "attempt to impose radical secularism everywhere"). Despite strong currents of Islamophobia and the general lack of inclusion of Muslims in the Christian Right, there have been occasional alliances and joint ventures between some Christian organizations associated with the religious right and certain Muslim communities and organizations. *See, e.g. News from the President*, INT'L SOC'Y FOR HUM. RTS., https://ishr.org/global-evangelical-and-muslim-organizations-launch-major-joint-religious-freedom-project/ [https://perma.cc/G6A8-77BP] (announcing a "joint effort to respond globally to threats to religious freedom coming from religious extremism and secular extremism," launched by "[l]eaders of the world's largest independent Muslim organization [Humanitarian Islam] and the world's largest Christian Evangelical organization [the World Evangelical Alliance"); Tom Perkins, *Conservative Muslims join forces with Christian Right on book bans*, THE GUARDIAN (Oct. 16, 2022, 5:00 PM) https://www.theguardian.com/us-news/2022/oct/16/dearborn-michigan-book-bans [https://perma.cc/A3V3-LKNG] as discussed in Uddin, *supra* note 9. For a recent example of an American Hindu supporting

give a complete account of how these different groups have come together to create a powerful political bloc aimed at taking down the "Liberal Establishment" is a tall order. It requires traversing the fields of cultural and social history, intellectual history (focused on the intertwined histories of religious and political thought, delving back at least as far as the Renaissance),[39] and American legal history (focused not only on the history of the conservative legal movement but also on the more neglected history of the influence of liberal Protestantism on American law and culture,[40] as well as the cognate history of how minority religious groups that entered into the precincts of the Protestant Establishment, in particular, Jews and Catholics, influenced, and even helped to form, the Establishment).[41] Even taller an order, which in future work I also hope to fulfill, is to conjoin this social and intellectual history with a legal analysis of the ongoing battles over First Amendment doctrine between disestablishmentarians and antidisestablishmentarians that reflect this complex cultural history.[42] Ultimately, my aim is to distill from this

the agenda of the religious right, *see* Molly Olmstead, *How Vivek Ramaswamy, a Hindu, is Aligning Himself With Christian Nationalists*, SLATE (Aug. 29, 2023, 4:12 PM) https://slate.com/news-and-politics/2023/08/vivek-ramaswamy-religion-hindu-christian-nationalism.html [https://perma.cc/AN7A-WC66].

39. *See* COATES, WHITE & SCHAPIRO, *supra* note 12; FUNKENSTEIN, *supra* note 12; EDEN, *supra* note 12; WALDRON, *supra* note 12. Stolzenberg, *The Profanity of Law*, *supra* note 12; Stolzenberg, *Theses on Secularism*, *supra* note 12; Stolzenberg, *Political Theology With a Difference*, *supra* note 12; Stolzenberg, *The Return of Religion*, *supra* note 12; Stolzenberg, *From Eternity to Here*, *supra* note 12; ISRAEL, *supra* note 13; LORBERBAUM, *supra* note 13; Stone, *supra* note 13; Stolzenberg, *Jewish Legal Theory*, *supra* note 13.

40. I am referring specifically to the neglect of liberal Protestantism as a topic in American legal scholarship. In the general field of American history, the topic of liberal Protestantism's influence on American culture is not at all neglected. See, for example, the classic studies of American intellectual history by Perry Miller and the more recent investigations of David Hollinger. PERRY MILLER, ERRAND INTO THE WILDERNESS (1952); PERRY MILLER, THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE (1953); PERRY MILLER, THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY (1954); PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR (1965); HOLLINGER, *supra* note 27; DAVID HOLLINGER, IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS (1989). But, despite Perry Miller's early work on the subject, PERRY MILLER, THE LEGAL MIND IN AMERICA (1961), the influence of liberal Protestantism on the development of American law has yet to explored in depth. Nor has sufficient attention been given to the effect on American law of the fusion of liberal Protestantism with Jewish humanist and secularist thought that took place as a result of the cultural encounters between the Protestant and Jewish intelligentsias.

41. For one particularly notable example of Jewish participation in the formation of the Establishment, see BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE ESTABLISHMENT (2022).

42. In this regard, the historical project sketched out here can be understood as a complement to Richard Schragger, Micah Schwartzman and Nelson Tebbe's account of "what explains the shift" from a liberal to a conservative "model of relations between

combined historical and legal analysis a normative argument about how the theological tradition that underlies liberal Protestantism—the theological tradition of humanism or, if you will, "secular humanism"—can be reclaimed to provide a better defense of a disestablishmentarian approach to the First Amendment than those currently on offer. This would be a defense that, rather than ducking behind the false illusions of liberal "neutrality," recognizes the theological underpinnings of secularist and humanist values, acknowledges their cultural specificity, and squarely faces the challenge presented by present-day antidisestablishmentarians, who argue, not unpersuasively, that disestablishmentarianism has only served to perpetuate the Establishment and its secular, humanist theology.

Here, I can do no more than offer an outline of this project, delineating the various steps of the argument I hope to advance in future work. My hope is that, notwithstanding the skeletal nature of the presentation here, this Article can serve to illuminate some neglected aspects of the battles over religious liberty law that have long been simmering and now are boiling over. In doing so, I hope I might prod others to join me in thinking about how the old battles over liberal Protestantism (and the Protestant elite that espoused it) continue to reverberate in the current day.

Of course, the battles against liberal Protestantism—and liberal Protestants—are not the only source of the contemporary culture wars. There were *many* factors—economic and racial factors, military and foreign policy concerns, as well as changing sexual morés, family structures, and ideas about gender—which all played important roles in leading conservative Catholics and Protestants to enter into the political coalition out of which the modern-day conservative religious movement emerged. It makes no more sense to identify theology as the single driver than to say that the sole catalyst was race or abortion or (as used to be said) evolution. There was no one single issue that mobilized the religious right. The alliance that formed between evangelical Protestants and conservative Catholics in the aftermath of the school prayer and school aid decisions of the 1960s was, rather, the product of a complex interaction of all of these factors, which continue to shape and reshape the conservative movement in dynamic and complex ways that defy any simple summary.

That said, the point I am trying to make here is that class, as a social formation in the United States, is inextricable not only from race, but also from the historical dominance of Protestantism and, more particularly, of the ascendance of liberal Protestant theology within American Protestantism. The distinction between "mainline" Protestant Churches,

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religion and government" that has occurred in recent years. Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, forthcoming in 91 U. CHI. L. REV. (2024).

which by and large embraced theological modernism, and "non-mainline" Protestant Churches, which became strongholds of fundamentalism, correlates with class divisions. Therefore, to focus on class-based economic resentments as motivators of the religious right without paying attention to this correlation is to neglect an important aspect of class dynamics in America.

Regarding the racial dimensions of these overlapping differences of class and theological and cultural orientations, suffice to say here that it is neither the case that there is a simple correlation between race and theological orientation, nor that race is *not* an element of these conflicting theological orientations. As for issues of gender and sexuality—which is to say, all of the threats to "traditional family values" around which the religious right has mobilized, including but by no means limited to abortion, feminism, gay marriage, and, most recently, transgender rights— I argue that these are conflicts that cannot be fully understood apart from the broader religious conservative attack on "secular humanism," under which every one of these specific targets is subsumed. Despite the fact that it often seems to serve as nothing more than a bogeyman, a blank screen onto which every socially conservative complaint is projected,[43] "secular humanism" is not just a slogan or mere empty rhetoric. It is, rather, an actual intellectual tradition with a documented history, out of which the popular attitudes and outlooks that we call "modern," "secular," and "progressive" evolved.

More specifically, it is a *theological* tradition that arose out of the encounter that occurred in the fifteenth and sixteenth centuries between Christian and classical thought, in tandem with parallel encounters between the classical tradition and Muslim and Jewish thought.[44] It is widely recognized that Renaissance Humanism, the label affixed to the intellectual efflorescence that resulted from this encounter between the three great monotheistic faiths and the classical heritage, is the font of modern secular scientific and political thought.[45] Eventually, the ideas

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43. *Cf.* Stolzenberg, *supra* note 11, at 614-15 (*citing* Heinz, *supra* note 28) (discussing writers who describe secular humanism as "a screen upon which the New Christian Right projects all that is hostile to its own mythology," but concluding that "[s]ecular humanism is not, however, a paranoid fantasy of its opponents.").

44. The literature on the humanist tradition is far too vast to sample here. Instead, I will simply call attention to the work of two scholars upon whom I have heavily relied: FUNKENSTEIN, *supra* note 12, and EDEN, *supra* note 12. *See also* KATHY EDEN, POETIC AND LEGAL FICTION IN THE ARISTOTELIAN TRADITION (1986).

45. Paul Oskar Kristeller, *Humanism*, 16 MINERVA 586, 586 (1978) (writing that renaissance humanism "left a deep impact on the later history of Western civilisation down to the present"); James Hankins, *Humanism and the Origins of Modern Political Thought, in* THE CAMBRIDGE COMPANION TO RENAISSANCE HUMANISM (1997).

underlying those modern intellectual projects percolated into the broader culture, with the result that those of us who are the heirs of the "modern" worldview that is the legacy of humanism tend to be unaware of its theological underpinnings. But the fact that humanism was developed by Catholic theologians and subsequently elaborated upon by Protestant theologians[46] is not lost on its religious critics. Nor is the paradoxical fact that this theological movement was intertwined with secularism from the start.[47] At the very core of Renaissance humanism lay the basic idea, which also lies at the heart of secularism: that knowledge of the natural world as well as knowledge of morality could be, indeed must be, produced by human beings using their natural, fallible, but nonetheless adequate faculties of perception and reason. This idea led, in turn, to the further secularist proposition that human beings could and must be agents of their own destiny, acting of their own free will rather than as puppets of divine predestination on the stage of human history.[48] While remaining embedded in religious faith and in theological doctrines, humanist thought, as it was developed by Christian intellectuals (in interaction with Jewish and Muslim thinkers), was thus profoundly secularist in the specific sense that it affirmed the necessity and legitimacy of autonomous human action, of man-made (secular) knowledge, man-made (cultural) values, and man-made (positive) law.[49] Yet at the same time, it was profoundly theological. Indeed, in the eyes of its intellectual opponents, the problem with humanist secularist thought (or "secular humanism") is not that it is *not* a theology, but rather, that it is a *false* theology, a mistaken and, worse still, deceptive theology that cunningly presents itself as a

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46. FUNKENSTEIN, *supra* note 12, at 211, 222-227, 271, 279-89, 346; Stolzenberg, *From Eternity to Here*, *supra* note 12. It bears mention that Catholic humanist and Jewish humanist thought were both indebted to the recovery of the classical tradition by Muslim jurists and theologians, such as Averroes (aka Ibn Rushd). *See* Anthony Raphael Etuk & Livinus Ibok Anweting, *Revisiting Averroes's Influence on Western Philosophy*, 12 PHILOSOPHY STUDY 65 (2022).

47. On the intertwining of humanist theology with secularism, see Funkenstein's analysis of "secular theology," FUNKENSTEIN, *supra* note 12, at 211, 222-227, 271, 279-89, 346; I discuss this in my series of articles on the theological origins of secularist and liberal theories of law. Stolzenberg, *The Profanity of Law*, *supra* note 12; Stolzenberg, *Theses on Secularism*, *supra* note 12; Stolzenberg, *Political Theology With a Difference*, *supra* note 12; Stolzenberg, *The Return of Religion*, *supra* note 12; Stolzenberg, *From Eternity to Here*, *supra* note 12.

48. FUNKENSTEIN, *supra* note 12, at 211, 222-227, 271, 279-89, 346; Stolzenberg, *From Eternity to Here*, *supra* note 12.

49. Stolzenberg, *From Eternity to Here*, *supra* note 12, at 9; Stolzenberg, *Political Theology*, *supra* note 12, at 24.

Christian viewpoint but is, in fact, anti-Christian, the very antithesis of true religion.[50]

The point of this historical excursion is not to wade through centuries of theological and philosophical disputation. It is, rather, to illuminate the seemingly paradoxical idea of "secular theology," as one historian of science and religion has termed the theological tradition that affirmed the legitimacy and necessity of secular thought, out of which humanism and modernism evolved.[51] Christianity, Judaism, and Islam all produced theories about why and when the production of secular knowledge derived from human reason is authorized that were based on theological doctrines about the nature of human beings and the nature of God; and they did so at basically the same time, in conversation with each other. [52] It is out of this secularist—and humanist—tradition of theology, to which Muslims, Jews, and Christians all contributed, that modern science arose. And this theological tradition is also the intellectual foundation of the basic idea of a necessary separation between temporal and spiritual spheres of authority, activity, and knowledge out of which modern theories of secular law and politics arose.[53]

To be sure, this original conception of separation between church and state by no means precluded cooperation between religious and secular authorities or even the establishment of a state religion.[54] Nor was it, in the

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50. *See, e.g.,* SCHAEFFER, HOW SHOULD WE THEN LIVE?, *supra* note 11, at 175 (asserting that, after the Reformation, "a more total form of humanism entered the Protestant church, and gradually spread to all the branches of the church, including the Roman Catholic. The concept of man beginning from himself now began to be expressed in theology and in theological language. Or we can say that these theologians accepted the presuppositions of rationalism.").

51. *See* FUNKENSTEIN, *supra* note 12, at 3-12. *See also* Stolzenberg, *Political Theology, supra* note 12, at 417.

52. *See generally* Stolzenberg, *Profanity of Law*, *supra* note 12. On the Islamic conception of the secular, particularly as a feature of Islamic law, see SHERMAN JACKSON, THE ISLAMIC SECULAR (2024).

53. *See* Stolzenberg, *Profanity of Law*, *supra* note 12 (relying on, *inter alia*, JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME (1977); GIL GRAFF, SEPARATION OF CHURCH AND STATE: DINA DE-MALKHUTA DINA IN JEWISH LAW, 1750-1848 (1985); J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 CARDOZO L. REV. 829 (1991); Arnold Enker, *Aspects of Interaction Between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137 (1991); Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157 (1991).

54. *See* John J. Coughlin, *Separation, Cooperation, and Human Dignity in Church-State Relations*, 73 THE JURIST: STUDIES IN CHURCH LAW AND MINISTRIES 539 (2013); *Separation of Church and State* 6, BOISI CENTER PAPERS ON RELIGION IN THE UNITED STATES https://www.bc.edu/content/dam/files/centers/boisi/pdf/bc_papers/BCP-Church State.pdf [https://perma.cc/HWG8-U4X2] (describing the Puritan belief that church and state were ordained by God to serve separate ends, but in a "close and compact" relation

first instance, a mandate to tolerate other religions. But perhaps the most essential characteristic of the humanistic tradition, in which even the most conservative conceptions of church-state separation are embedded, is its dialectical quality, that is, its belief in the need for continual self-examination and self-criticism in order to discern and correct the inevitable shortfall between current practices and institutional arrangements and the humanist ideals they are intended to realize.[55] Social practices and institutional arrangements are understood, in this tradition, to be human (all too human), precisely because they begin with a religious awareness of human beings' cognitive limitations as well as their moral weaknesses—and their compensatory strengths. Because of this, humanism is committed to a continual process of self-correction and institutional, as well as personal, reform. Herein lies the progressivist and perfectionist aspect of the liberal tradition that has recently been remarked upon by Sam Moyn.[56] The restless search for ever more perfect incarnations of the (Christian/Jewish/Muslim) humanist ideals of justice, peace, and brotherly love led, over the course of centuries, to continual reinterpretation of these ideals and to continual reconstruction of the political and social institutions that were supposed to embody them. This quest eventually led to the embrace of the principles of religious liberty and tolerance, along with other liberal principles, including the principle of disestablishment.[57]

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with one another); Charles Adside, III, *The Establishment Clause Forbids Coercion, Not Cooperation, Between Church and State: How the Direct Coercion Test Should Replace the Lemon Test*, 95 N. DAKOTA L. REV. 533 (2020); MICHAEL W. MCCONNELL, ROBERT F. COCHRAN, JR., & ANGELA C. CARMELLA, CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (2001). *See also* Stephen D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom*, 122 HARV. L. REV. 1869 (2009); Stephen D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 958-59 (1989).

55. For further explication of how the embrace of human reason, combined with a recognition of its inherent deficiencies, led to the recognition of the need for checks and balances and methods of self-correction, *see* Stolzenberg, *Political Theology*, *supra* note 12, at 428-29. On the origins of the humanist dialectic, *see* Lisa Jardine, *Lorenzo Valla and the Intellectual Origins of Humanist Dialectic*, 15 J. OF THE HIST. OF PHIL. 143 (1977).

56. SAMUEL MOYN, LIBERALISM AGAINST ITSELF: COLD WAR INTELLECTUALS AND THE MAKING OF OUR TIMES (2023) (lamenting the discarding of these elements of liberalism that took place during the Cold War, when liberals recoiled from the atrocities to which some of the more notorious versions of dialectical humanism had led, and retreated into a neo-Orthodox, anti-progressivist and anti-perfectionist Christian pessimism, rooted in the doctrine of original sin.).

57. In other hands, the dialectical humanist analysis led to a critique of the principle of freedom exemplified by Jewish emancipation as an inadequate instantiation of true equality and freedom, whose limitations could only be overcome "[b]y abolishing religion." KARL MARX, ON THE JEWISH QUESTION (1884).

The liberal Protestantism that arose in 19th and 20th century America was a direct heir to this tradition of humanist theology that, eventually, questioned everything in its ceaseless quest for a more perfect realization of the ethical ideals of Christianity, including traditional beliefs about marriage and natural social hierarchies, the doctrine of original sin, religious establishment, and religion itself. "Question authority," the mantra of the sixties' counterculture, was but the apotheosis of this liberal Protestant tradition, born of the dissenting Protestant tradition, of questioning and questing in pursuit of the highest ethical and spiritual ideals. Which is to say that the anti-establishment posture of the counterculture of the sixties (like the various countercultural movements that preceded and succeeded it) was also a product of the religious (yet secularist) Protestant (yet ecumenical) culture that animated the Protestant Establishment. This goes a long way toward explaining the sympathy exhibited by Establishment leaders (to varying degrees) for the goals and even, in some instances, the tactics, not just of the civil rights movement, but also the more militant Black Power movement, the anti-war movement, the anti-poverty movement, and the feminist movement.[58] All

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58. KARABEL, *supra* note 3, at 382, 384 ("From the perspective of . . . men of the Establishment, taking strong measures to rectify racial injustice was not simply a moral imperative; it was also a matter of enlightened self-interest at a time when the existing order was under challenge." This was the only thing that "could preserve the essentials of the American way of life at a time that racial violence was threatening to tear the nation apart."); *see also* KABASERVICE, *supra* note 35, at 169-70 (describing the sympathy of Paul Moore, "elected the Episcopal suffran Bishop of Washington [D.C.] in 1963," with European radical labor politics and his belief "that blacks in the United States might be the equivalent of the European working class"), *id.* at 170-71(describing his commitment to anti-poverty work), *id*. at 171 (explaining how his "[f]irst-hand exposure to injustice against African-Americans" first led Moore to support the NAACP Legal Defense Fund and to join "a legal team, headed by Thurgood Marshall, that went to Groveland, Florida" after which "he returned to Jersey City to preach the gospel of social action, 'a gospel spelled out in civil rights, integration, and improved housing, in meeting the needs of poor people by empowering them to change the system that oppressed them,'"(quoting PAUL MOORE, PRESENCES: A BISHOP'S LIFE IN THE CITY 129 (1997)), *id*. at 172 (describing the role played by Yale University chaplain William Sloane Coffin in "changing the climate at the university," beginning with his participation "in numerous civil rights protests, in 1961,"), *id*. at 178 (describing the support given by Yale University president Kingman Brewster to black students protesting an address by George Wallace, which led to his being "accused of siding with sensitivity to minorities over the hallowed principle of free speech," and praising Brewster as "the first Yale president to pay serious attention to the way in which the university's role as the largest corporate employer in the city affected the urban population, particularly, the minority population,") *id*. at 179 (describing Brewster as "temperamentally inclined toward activism,"), *id*. at 183-85 (describing Paul Moore's "apotheosis" that coincided with his participation in the March on Washington), *id*. at 232 (recounting that "[i]n 1965, Kingman Brewster, President of Yale and member of the liberal establishment, 'defended the free speech of students and faculty members who sent an antiwar faculty petition to Lyndon Johnson and took part in an antiwar rally.'"), *id*. at

these movements arose in the same time period when the Supreme Court was "perfecting" the disestablishment of religion, a process that had begun in the late eighteenth century when states voluntarily dismantled their official religious establishments, resumed in the period from 1840 to 1900, when legal protections for Christianity that remained commonplace after the process of official disestablishment began to be challenged, but remained, from the point of view of its proponents, incompletely instituted and inadequately theorized up until the mid-twentieth century.[59]

The key point here is that disestablishment was a core commitment of liberal Protestantism. Which is to say that disestablishment was a (liberal) Protestant value and not just a value, but a (liberal) Protestant *practice*, not a singular event, but an ongoing process that yielded a new social order and power structure. Or perhaps it is better conceived as the old social order and power structure, transformed yet preserved,[60] and committed to its own ongoing disestablishment and preservation. Disestablishment, as it has played out in America, has been a distinctively Protestant

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302 (describing Moore's and William Sloane Coffin's involvement with the anti-war "interfaith group that came to be known as Clergymen and Laymen Concerned About Vietnam,"), *id*. at 384 (describing Brewster's reliance on the advice of Paul Moore "regarding student disruptions,") *id*. at 387 (describing the involvement of Paul Moore's daughter in black revolutionary politics and her success in "prevail[ing] on William Sloane Coffin to allow [Bobbie] Seale to speak in Battell [the Yale chapel],"), *id*. at 390 (paraphrasing Mayor John Lindsay as saying that the reason men like Lindsay, Brewster, and [Ford Foundation president and former national security advisor McGeorge] Bundy listened to radicals … was not that they were in the grip of 'radical chic' but that the radicals were often at least partly right,"), *id.* at 465–66 (recounting that, in the 1960s, the liberal establishment "came to think of . . . the responsibility of elite white males to uphold wider opportunity for those who were not elite, white, or male." In meeting their responsibility, the "liberal establishment worked with the grass roots to increase social mobility and equality.").

59. In a series of books, the historian and religious studies scholar Steven Green has described these three phases as "the first," "second," and "third disestablishments." *See* STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN 19TH CENTURY AMERICA (2010); STEVEN K. GREEN, THE THIRD DISESTABLISHMENT: CHURCH, STATE, AND AMERICAN CULTURE, 1940–1975 (2019). On the various forms of state involvement with churches and religious congregations that persisted after "the first disestablishment," *see* Sarah Barringer Gordon, *Religious Corporations and Disestablishment*, *1780–1840, in* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman et al. eds., 2016); *see also* Gordon, *supra* note 22. For an incisive historical account of the disestablishmentarian judicial project that commenced in the mid-twentieth century, *see* Schragger, Schwartzman & Tebbe, *supra* note 42.

60. I am making use here of Reva Siegel's concept of "preservation-through-transformation." *See* Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2178-87 (1996); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) (explaining that the concept refers to the way in which status-enforcing action evolves in form as it is contested.).

phenomenon in all of the following respects. First, all the official state religious establishments that were disestablished were Protestant.[61] Second, these official state religions were disestablished in the main *by* Protestants.[62] Third, and most enduringly, what official disestablishment left in its wake was "the Establishment," a cultural and economic elite that itself was distinctly culturally Protestant.[63] This unofficial Establishment continued to exercise political power and cultural dominance notwithstanding (indeed owing to) its relegation to the private sphere, where economic and cultural power were readily translated into political influence. Successive generations of the Establishment used this influence both to perpetuate the culture and privileges of its members and to further the process of disestablishment by further secularizing public and private institutions (which it controlled) and by curtailing the privileges of the hereditary elite. Disestablishment has thus continually constituted and reconstituted The Establishment, even as it continually, often quite earnestly, albeit incompletely, inconsistently, and sometimes hypocritically tried to disestablish the new forms of privilege and social hierarchy that inevitably emerge.

In case I am not making this paradoxical point sufficiently clear, I am arguing that the Protestant Establishment and disestablishment are not two different things, but rather, two aspects of one single thing, which we might well refer to as the Protestant (Dis)Establishment. Further, the fact that disestablishment was a practice *of* the Establishment, which served to *reconstitute* the Establishment, is something that the Protestants and Catholics who founded the Christian Right clearly perceived—and, in the case of those of them who attended "mainstream" and elite colleges and universities, did not just perceive, but directly, and oftentimes painfully, experienced.[64] Inside these precincts, they bore witness to the exclusionary ways of the members of the Establishment and to the liberal ways of the Establishment, including its growing commitment to disestablishment, a policy that was voluntarily being instituted by the elite colleges and universities they attended.[65] Indeed, the admission of Jews, Catholics, non-elite Protestants, and (a very small number of) Blacks in the elite schools historically controlled by the Protestant elite was an outgrowth of liberal,

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61. *Amdt1.2.2.3 State-Established Religion in the Colonies*, Legal Information Institute, https://www.law.cornell.edu/constitution-conan/amendment-1/state-established-religion-in-the-colonies [https://perma.cc/6SYM-5KPB].

62. Gordon, *supra* note 22.

63. See BALTZELL, *supra* note 2.

64. On the rising rates of Catholic attendance at historically Protestant colleges and universities, *see* MAHONEY, *supra* note 34.

65. *See generally* KARABEL, *supra* note 3; THE SECULARIZATION OF THE ACADEMY, *supra* note 35; MARSDEN, *supra* note 35; KABASERVICE, *supra* note 35.

Protestant theological tenets, which increasingly seemed, to those who espoused them, to require the democratization of education and the secularization of educational and political institutions in order to protect religious and intellectual freedom.[66] Both private universities and colleges and the public schools and universities (many of which were frankly religious in character when they were established and continued to maintain their religious character well into the mid-twentieth century) underwent what scholars have described as a process of "disestablishing" Protestantism over the course of the first half of the twentieth century, largely of their own accord.[67] This process of secularization that took place at the state universities and the elite private colleges and universities where Protestantism had long held sway occurred at virtually the same time that the Supreme Court was decreeing that the principle of religious equality, which it held to be embodied in the Establishment Clause, required the removal of prayer and Bible reading (most of which was Protestant, if "nonsectarian," in character) from public schools.[68]

The striking feature of these convergent developments was the extent to which this process of disestablishing Protestantism in the nation's schools and universities was self-imposed. This is perhaps the most important sense in which disestablishment was, and remains, a project of the (Protestant) Establishment. Both the judicial project of ordering the disestablishment of public schools (and other public institutions) and the largely voluntary process of lowering the barriers to admission at institutions of higher education were fueled in no small measure by the growing recognition (on the part of Protestant leaders) of the incompatibility between their (liberal) Protestant values and the exclusive nature of historically Protestant schools. Indeed, beyond lowering (albeit by no means eradicating) the barriers that historically excluded non-Protestants and Protestants whose subordinate economic position, race, or "background" historically denied them access to these bastions of the Protestant elite, leaders of the historically Protestant colleges and

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66. This is not to say that the liberal Protestant value-system was the only motivator of the changes in admissions policies. Among other factors, the dawning recognition of the importance of scientific research to national security and economic and military interests and Cold War politics played at least as great a role in driving these changes as the liberal cultural sensibility of the leaders and the constituencies of Establishment institutions did. On the interaction of these two different kinds of factors, see KARABEL, *supra* note 3; THE SECULARIZATION OF THE ACADEMY, *supra* note 35; MARSDEN, *supra* note 35; KABASERVICE, *supra* note 35.

67. THE SECULARIZATION OF THE ACADEMY, *supra* note 35.

68. Engel v. Vitale, 370 U.S. 421 (1962) (state-composed prayer cannot be conducted in public schools); Sch. Dist. Of Abington Township v. Schempp, 374 U.S. 203 (1963) (public schools cannot sponsor devotional Bible reading and recitations of the Lord's Prayer).

universities took affirmative steps to increase the number of "high school" (i.e., public school as opposed to prep school) students. In so doing, the Establishment deliberately increased the number of Jewish, Catholic, and non-elite Protestant students, thereby essentially disestablishing itself, leaving in its wake another power structure—or perhaps the same power structure, preserved yet demographically transformed—with a cultural and political ideology no less expressive of the outlook of the liberal Protestant theology favored by upper class WASPs than the Protestant Establishment that existed before.

The upshot of all of this is that, notwithstanding its greater religious and ethnic diversity, today's "Liberal Establishment" is every bit the product of the secularist, humanist theological tradition that defined liberal Protestantism as yesteryear's WASP Establishment was. And today's religious right remains as exercised by, and opposed to, this tradition as their fundamentalist forbears were.

I offer this thesis in the hopes of providing a better understanding of what the religious right is actually opposed to. As stated above, "secular humanism" is not (just) a figment of a fervid conservative imagination. This is not to say there are no distortions in the perception of secular humanism held by its opponents; the conservative imagination of the liberal imagination is anything but charitable, and paranoid conceptions abound. But even the most fervid of screeds against secular humanism has a grain of truth, the truth being that secularism and humanism and the compound, secular humanism, are apt labels for the liberal worldview that is the product of centuries of dialectical thinking about how best to implement and institutionalize humanist ethical values. This is a worldview that is by no means the exclusive property of Protestantism (or of liberalism; Marxist and other leftwing antiliberal philosophies also evolved out of the tradition of dialectical humanism, as have certain strands of religious "postliberalism"). The original proponents of Renaissance humanism were, after all, Catholics (e.g., Erasmus), who were inspired by Muslim theologians, jurists, and philosophers (e.g., Averroes), and humanistic thought was developed by Jews (e.g., Spinoza), as well as by Protestants and Catholics.[69] Humanist and anti-humanist theologies have long coexisted, not at all peacefully, within each of these faith traditions.[70] But in the United States, where the majority of the

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69. COATES, WHITE & SCHAPIRO, *supra* note 12; FUNKENSTEIN, *supra* note 12; EDEN, *supra* note 12; WALDRON, *supra* note 12. Stolzenberg, *The Profanity of Law*, *supra* note 12; Stolzenberg, *Theses on Secularism*, *supra* note 12; Stolzenberg, *Political Theology With a Difference*, *supra* note 12; Stolzenberg, *The Return of Religion*, *supra* note 12; Stolzenberg, *From Eternity to Here*, *supra* note 12.

70. COATES, WHITE & SCHAPIRO, *supra* note 12; FUNKENSTEIN, *supra* note 12; EDEN, *supra* note 12; WALDRON, *supra* note 12. Stolzenberg, *The Profanity of Law*, *supra* note

population was Protestant for most of its history, and where the dominant culture and political class was decidedly Protestant, it was the Protestant version of humanism, and more specifically, an American version of liberal Protestant humanism, that became ascendant. And it was against *this* version of humanism, and against the elite regarded as responsible for its promotion (among its other ostensible sins), that anti-secular-humanist Protestants and anti-secularist Catholics first took aim, at first on separate tracks, but ever since the 1960s, shoulder to shoulder.

Again, this is not to say that the way religious conservatives depict this tradition is perfectly accurate. To the contrary, the lens through which religious conservatives view secular humanism can fairly be said to be distorted. But no less so is the lens through which those of us who are the heirs of this theological tradition see it—or fail to see it. Indeed, our distorted vision verges on total blindness to the existence of humanism and secularist ideas as a *theological* tradition that historically shaped, and continues to exert its influence on modern liberal and postliberal thought. It is only by taking conservative rhetoric about "secular humanism" seriously that we can come to a better understanding not only of "them," i.e., those who subscribe to the conservative, anti-liberal, anti-secularist, anti-humanist theological outlook, but of "us," that is, those of us who reject this outlook. For we simply cannot understand this outlook, much less how it interacts with resentment of the economic and social privileges of the liberal Establishment, without understanding the ongoing role of objections to the theology of liberal Protestantism and the underlying theology of humanism on which it rests.

This, then, is my core thesis: the battle over liberal Protestantism (a philosophical and, at the bottom, theological divide), coupled with ongoing resentment against the Protestant Establishment (a class and cultural divide), is one of the chief drivers of the ongoing effort to change the way the constitutional provisions protecting the free exercise of religion and prohibiting the establishment of religion are interpreted. The doctrines of religious liberty and separation of religion and state developed by the courts in the 1940s, '50s, '60s, and '70s reflected a growing commitment to disestablishment that was an outgrowth of the basic tenets and outlook of liberal Protestantism to which many in the Establishment subscribed. The movement to roll back these disestablishmentarian doctrines was every bit as much an anti-Establishment movement (which is to say, an anti-*Protestant* Establishment movement) as it was an antidisestablishmentarian movement. This was certainly true at the

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12; Stolzenberg, *Theses on Secularism*, *supra* note 12; Stolzenberg, *Political Theology With a Difference*, *supra* note 12; Stolzenberg, *The Return of Religion*, *supra* note 12; Stolzenberg, *From Eternity to Here*, *supra* note 12.

inception of this movement in the 1960s, and it was also true at the time of its initial public visibility when the Moral Majority emerged as a significant force in American politics at the end of the 1970s.[71] And—this is the more counterintuitive claim—it remains true today.

If the claim that the resentment against the Protestant Establishment continues to shape the conservative religious movement is hard to swallow, that can be explained by my corollary thesis, which is that, insofar as the Protestant Establishment has seemingly disappeared, it has been succeeded by what I call the Protestant (Dis)Establishment. By that I mean both the existence of a legal regime that reflects a particular conception of rights (a liberal Protestant conception of rights, tied to a liberal Protestant conception of religion) and the existence of an elite class that supports, and is supported, by this legal regime, which can fairly be seen as perpetuating the pre-existing liberal Protestant power structure and its cultural worldview, even though its institutions and practices are secular and the elite class no longer is restricted to WASPs. The principle of disestablishment that guided the Supreme Court's interpretation of the Free Exercise and Establishment Clauses in the Cold War era was an outgrowth of liberal Protestant theological tenets, which appeared to many people at the time to demand the secularization of educational and political institutions in order to protect religious and intellectual freedom and democratize access to educational and economic opportunities. The idea that the state needed to be separated from religion was a core principle of liberal Protestantism to which the Protestant Establishment became increasingly committed over time. This had the confusing effect of rendering antidisestablishmentarianism an anti-Establishment position, while making disestablishmentarianism a hallmark of membership in the Establishment. Even as the demography of the Establishment became more ethnically, racially, and religiously diverse (not to mention open to women), the formerly excluded groups that were admitted became essentially "Protestantized,"[72] not necessarily in the sense of converting to

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71. *See* GIFFORD & WILLIAMS, *supra* note 6; SHÄFER, *supra* note 6.

72. *See, e.g.*, George A. Kelly, *Faith, Freedom, and Disenchantment: Politics and the American Religious Consciousness*, 111 DAEDALUS 127, 127 (1982) ("Both Catholicism and Judaism, by multiplying and prospering in America, have become partly Protestanized"); Richard Brookhiser, *The Way of the WASP, in* CRITICAL WHITE STUDIES 16, 17 (Richard Delgado et al. eds., 1997) ("[T]he economic gap between white Protestants and white Catholics in this country has vanished, which means . . . that American Catholics have Americanized (Protestanized) themselves."); Ronald Beiner, *Liberalism, Pluralism, and Religion, in* PHILOSOPHY IN A TIME OF LOST SPIRIT: ESSAYS ON CONTEMPORARY THEORY 44, 47 (1997) ("When we look at the contemporary scene in the United States, we see . . . that, . . . American Catholicism has been more thoroughly 'Protestanized' than the fundamentalist Protestant sects have"). *See also* LEORA BATNITZKY, HOW JUDAISM

Protestantism, but in the sense of adopting a view of religion that is the very essence of liberal Protestantism: a privatized view of religion, which is just as anathema to conservative Protestants as it is to many non-Protestants.

To fully understand these claims, we will need to attain a better understanding of what made the Liberal Protestant Establishment liberal, what made it Protestant, and what made it an Establishment. And to do that, we need to understand the liberal theology of the Protestant Establishment, and how it evolved out of the longstanding tradition of humanist theology, otherwise known as "secular theology"[73] or secular humanism. We will need to observe how, over time, liberal Protestantism—and liberal *Protestants*, especially those who composed the intellectual, cultural, political, and legal elite—became increasingly committed to disestablishment. We need to trace how this commitment was put into practice in the form of disestablishmentarian legal doctrines, interpretations of the Establishment and Free Exercise Clauses adopted by the Supreme Court, as well through a host of institutional reforms implemented by non-judicial actors, most notably, the changes in admissions practices and curricular and extracurricular requirements (e.g., the abolition of mandatory chapel services) at private and state universities, which reflected the cultural ascendance of disestablishmentarian norms.

We then must trace how the implementation of these disestablishmentarian doctrines and practices ushered in a new social regime that perpetuates many of the features of the old Protestant Establishment, including its class structure and elitism as well as its commitment to liberal values and a privatized view of religion, religious liberty, and liberty *tout court*. We need to grasp what makes this new regime Protestant (or Protestant-ish), notwithstanding the more religiously and ethnically diverse demography of the new elite class and the genuinely secular nature of the institutions this elite inhabits, shapes, and runs. We might well classify this as a case of "preservation through transformation,"[74] in which the Protestant Establishment has transformed itself into what I call "the Protestant (Dis)Establishment," a social system that preserves the cultural inheritance of liberal Protestantism and maintains it as the outlook of at least a significant segment of the new elite class.

BECAME A RELIGION (2011) (arguing that Judaism was reconceptualized in the nineteenth and twentieth centuries to conform to the Protestant conception of a religion).

    73. *See* FUNKENSTEIN, *supra* note 12, at 3-12.

    74. See Siegel, *The Rule of Love*, *supra*, note 60.

Whether or not "we" recognize this ("we" being those of us who share this outlook and reject the outlook and agenda of the religious right), religious conservatives, or at least their thought leaders, do. The intellectual leaders of the movement, which formed because of the political alliance between fundamentalist Protestants and conservative Catholics, understood liberal Protestantism to be an expression of secular humanist theology. And movement leaders today understand what they call "secular humanism" to be a continuation of the liberal Protestantism that earlier generations of religious conservatives reviled. The perception that the Establishment has committed itself to dismantling hierarchical social orders—to dismantling "establishments" based not only on religion, but also on race, class, ethnicity, and gender—has only served to strengthen religious conservatives' sense that there exists an ongoing hierarchical social order, a (Dis)Establishment that is no less of an Establishment, and no less committed to the humanist theology of liberal Protestantism, than the old Establishment was.

Anti-Establishment antidisestablishmentarians are now firmly in charge of the Supreme Court. And prospects for reestablishing disestablishmentarianism on the Court at present are dim. But if this Article's theses are correct, then support for the antidisestablishmentarian agenda, where it exists, is turbo-charged by the potent combination of theologically-based objections (to disestablishment, to liberal Protestantism, and to secular humanism) and sociologically-based resentments against the perceived elitism and exclusionary practices of the erstwhile Protestant Establishment—practices that are perpetuated by the (Dis)Establishment that has succeeded the old Establishment. This suggests two ways in which support for antidisestablishmentarianism might be weakened or at least faced head on. First, we must confront the ways in which secular humanism—whether embodied in the form of a religious theology (e.g., liberal Protestant or Catholic theology or liberal humanist forms of Judaism) or in the form of a "nonreligious" ethical or philosophical position or outlook—has manifested itself in social formations that take a hierarchical form, with an intellectual elite positioned at the top and various groups relegated to the bottom. Second, we must recognize the theological foundations of the conflict and of our own perspective. I have foregrounded the theological differences between mainline Protestants and other Christians, not in order to minimize class and racial differences and the material forms of social inequality that historically defined the Protestant elite and continue to define the elite today, but rather to get us to pay attention to the interaction between theological disputes and material forms of inequality and to recognize the continuities that exist between the theological outlook of liberal

Protestantism which shaped the practices and institutions of the Establishment in the twentieth century and the various secular philosophies, e.g., liberalism, socialism, and yes, even Marxism, that have shaped the outlooks of Establishment *and* anti-Establishment institutions in the wake of the old Establishment's dissolution. Precisely because it was ultimately so successful in changing the way people perceive the world and because its consequences have been so wide-ranging, pervasive, and diffuse, this theological tradition often goes unrecognized, especially among its adherents, for whom it is not experienced as a particular philosophy to which they subscribe, much less a theology or a religious outlook, but simply as the natural way to view the world. Its opponents, however, have no difficulty in identifying it as the tradition of humanism or, as they are wont to say, "secular humanism," a term that is worth rescuing from both the opprobrium and the oblivion to which it has been consigned.