

**HOBBY LOBBY, CORPORATE LAW, AND
UNSUSTAINABLE LIBERALISM:
A REPLY TO CHIEF JUSTICE STRINE**

HARRY G. HUTCHISON*

INTRODUCTION	703
I. CHIEF JUSTICE STRINE’S ANALYSIS AND ARGUMENT	708
A. Prolegomena	708
B. The Road to “Social Progress” and Employee Autonomy.....	709
C. Healthcare in the Crosshairs of the Reformers	713
D. Opting out: The Hobby Lobby Decision and its Implications.....	715
E. The Issues Embedded in Strine’s Approach.....	718
1. Introduction.....	718
2. The Issues.....	721
II. UTILITARIANISM, PROGRESSIVE VALUES, AND THE FATE OF THE MARGINALIZED?	723
A. Prologue.....	723
B. The Consequences of the Pursuit of “Social Progress”	725
III. RELIGIOUS LIBERTY CABINED BY THE GROWTH IN THE “SECULAR STATE”?	733
IV. CORPORATE LAW PRINCIPLES AND <i>HOBBY LOBBY</i>	745
V. UNSUSTAINABLE LIBERALISM IN THE MIRROR OF CONTRADICTION	756
CONCLUSION.....	767

INTRODUCTION

It is likely that the dependence on, and the limits of, human cognition require us to adopt modes of analysis that make sim-

* Professor of Law, George Mason School of Law; Founding Fellow, Oxford Centre for the Study of Law & Public Policy. For helpful comments on earlier drafts, I am grateful to Elizabeth McKay and Joseph Hartman. The usual caveat applies.

plifying assumptions.¹ This insight has been richly applied to the domain of corporate governance and may prove equally true when applied to the sphere of rights. For instance, despite the presence of bounded rationality² in virtually all avenues of life, many proclaim that rights are universal.³ Whether or not such claims spring forth from simplifying assumptions, they provoke debate over whether everyone possesses fundamental rights merely by virtue of being human or whether rights are simply historically-contingent—a Western invention⁴—with limited logical and rational force within the context of a diverse globe or nation.⁵ Commentators have given divergent answers to this question. For instance, “Benjamin Constant, writing in the aftermath of the French Revolution, thought rights to be a modern innovation,”⁶ whereas Professor William Edmundson concluded that moral rights “are best understood as protected choices.”⁷ But even Edmundson’s compressed claim is subject to dispute. Contemporary political philosophy, bounded by “public reason” as well as cascading and colliding claims of liberty, rights, and freedom, may be doomed to futility.⁸ It is doomed for several reasons. First, many Westerners are captivated by the opportunity to invent, through the “exercise of the powers of choice[,] a diversity of natures, embodied in irreducibly distinct forms of life containing goods (and evils) that are sometimes incommensurable and . . . rationally incomparable”⁹ Second, there is an absence of any truly satisfactory way to reconcile modern hyper-pluralism with ambitious egalitarianism.¹⁰

1. Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 3 (2002) [hereinafter Bainbridge, *Nexus of Contracts*].

2. *Id.* (citing Herbert A. Simon, *Rational Choice and the Structure of the Environment*, in MODELS OF MAN: SOCIAL & RATIONAL 261, 271 (1958); Roy Radner, *Bounded Rationality, Indeterminacy, and the Theory of the Firm*, 106 ECON. J. 1360, 1362–68 (1996)).

3. WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 3 (2004).

4. *Id.*

5. See JOHN GRAY, ISAIAH BERLIN 7–10 (1996) [hereinafter GRAY, ISAIAH BERLIN] (examining Berlin’s view on freedom and liberty).

6. EDMUNDSON, *supra* note 3, at 5.

7. *Id.* at 193.

8. See Patrick J. Deneen, *Unsustainable Liberalism*, FIRST THINGS 25, 25–26 (Aug./Sept. 2012) [hereinafter Deneen, *Unsustainable Liberalism*].

9. GRAY, ISAIAH BERLIN, *supra* note 5, at 15.

10. See STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 81 (2014) [hereinafter STEVEN SMITH].

While disputes over rights and their origin consume the Latin West, the focus of this Article is substantially narrower but similarly complicated: Do corporations—particularly religious corporations—have rights, either directly or derivatively,¹¹ when such rights delimit the nation’s social safety net that progressives and liberals have constructed and sustained through novel interpretation of the law?¹² It is plausible that the construction of the social safety net, the linchpin of the pursuit of government-sponsored progress, has issued forth as a part of the insistent search for perfection despite the empirically verifiable observation that “[m]ankind’s quest for perfection has always turned dark.”¹³ Hence, America’s experimental, and perhaps utilitarian, quest for perfection—one that took on ravenous form during the Progressive Era and that was reified during the New Deal, Fair Deal, and the New Frontier—is not necessarily a blessing for civil liberties,¹⁴ especially for the civil liberties and economic status of the marginalized among us.¹⁵ Furthermore, it is possible that the liberal experiment and liberal society, taken together, have become inexorably “post-liberal” and more authoritarian,¹⁶ perhaps as a consequence of the fact that liberalism draws from its pre-liberal inheritance.¹⁷

In his recent article, *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*,¹⁸ Delaware

11. See Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1731 (2015) (suggesting that the Supreme Court has accepted the associational argument that corporate rights are derivative of the people the firm represents).

12. See RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 3–4 (2006) (noting that in order to achieve their expansive social ends, Progressives adopted a “realist” (sociological) jurisprudence that broke sharply from the then-dominant “formalist” approach to law as they urged judges to face the “new realities”).

13. EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE 9 (2003).

14. See EPSTEIN, *supra* note 12, at 102.

15. See, e.g., *id.* at 102–04 (noting that the re-segregation of the U.S. Civil Service was brought about under the Progressive regime of Woodrow Wilson and that Progressives championed state control over education in private schools, both religious and secular).

16. See Deneen, *Unsustainable Liberalism*, *supra* note 8, at 25–26; Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, in OUT OF AND INTO AUTHORITARIAN LAW 125–26 (András Sajó ed., 2003).

17. Deneen, *Unsustainable Liberalism*, *supra* note 8, at 25–26.

18. Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71 (2015).

Supreme Court Chief Justice Leo Strine endeavors to fashion an unbreakable link between the U.S. Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*,¹⁹ in combination with the Court's recent corporate law jurisprudence in *Citizens United v. FEC*,²⁰ and the reappearance of "corporate paternalism."²¹ Additionally, Strine stoutly defends the pursuit of "social progress" legislation.²² This quest may include efforts by self-interested political actors to seize government power in order to drive the majoritarian, if not the authoritarian,²³ pursuit of utilitarianism. Seizure by self-interested actors claiming the mantle of the public interest raises the specter of rent seeking.²⁴ Constructing an

19. 134 S. Ct. 2751 (2014). The *Hobby Lobby* decision was triggered by litigation brought by three corporations that sought an exemption from the requirements of the Patient Protection and Affordable Care Act of 2010 (ACA). Apparently, "[u]nless an exemption applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish 'preventive care and screenings' for women without 'any cost sharing requirements.'" *Id.* at 2762 (citing 42 U.S.C. § 300gg-13(a)(4) (2012)). This provision gives rise to a so-called "contraceptive mandate." The mandate is codified at 26 U.S.C. §§ 4980H, 5000A(f)(2) (generally requiring employers with fifty or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential health coverage"). "Any covered employer that does not provide such coverage must pay a substantial price." *Hobby Lobby*, 134 S. Ct. at 2762. Noncompliant employers must pay \$100 per day per affected employee or, alternatively, if the employer decides to stop providing health insurance altogether, the employer must pay \$2,000 per year for each of its full-time employees. *Id.* The primary legal issue in the case was whether the Religious Freedom Restoration Act of 1993 (RFRA) provides corporations animated by religious sensibilities with the right to an accommodation. *Id.* at 2759–60. The Court found the government's claim that the objecting firms' for-profit status extirpated their RFRA claims to be unworkable. *Id.* Implicitly, the Court decided that free-exercise exemptions for profit-pursuing corporations are not necessarily a form of unjustifiable favoritism. *Id.* For a discussion of *Hobby Lobby* within the realm of corporate law, see generally Harry G. Hutchison, *Religious Liberty for Employers as Corporations, Natural Persons or Mythical Beings?: A Reply to Gans*, 120 PENN. ST. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685872 [<https://perma.cc/85R2-GRP4>] [hereinafter Hutchison, *Religious Liberty for Employers as Corporations*].

20. 558 U.S. 310 (2010).

21. Strine, *supra* note 18, at 75–76.

22. *Id.* at 74, 82–83, 85–88.

23. Pildes, *supra* note 16, 125–26 (arguing that authoritarianism is an inherent structural tendency of democratic regimes and results from the tendency of partisan forces that gain temporary democratic control to attempt to leverage that control into more enduring and effective political domination as democratic processes must be structured through law but those in control of designing those laws are themselves self-interested political actors).

24. Rent seeking is the socially costly pursuit of wealth transfers and can be contrasted with traditional competitive profit seeking or entrepreneurship be-

analytical frame of reference that functions reliably with what Richard Epstein calls the “Progressive view of social progress,” one which “equate[s] active government with good government,”²⁵ Strine reasons that the instantiation of the nation’s social safety net during the Progressive Era and the New Deal rendered “corporate paternalism” less menacing to workers.²⁶ Nonetheless, he is disturbed by contemporary trends that ostensibly countenance third-party harms²⁷ as some employers seek shelter from the regulatory state’s voracious appetite via statutory or constitutional relief that is unwarranted, presumably because, in hefty reliance on his understanding of *Cantwell v. Connecticut*,²⁸ an employer’s “[c]onduct remains subject to regulation for the protection of society.”²⁹

This Article responds to Strine’s observations and analysis in several ways. Part I summarizes Chief Justice Strine’s argument and outlines the issues arising from it. Part II examines whether Chief Justice Strine’s somewhat utilitarian calculus eradicates debate or rather sparks it by reconsidering Progressive Era currents, New Deal labor law, and the ongoing—if not increasingly dire—plight of marginalized individuals and groups, despite increasing levels of government intrusion in society grounded in the presumed benefits of reform initiatives. Part III responds to Strine’s hypothesis that the United States can be defined plausi-

cause the latter, in contrast with the former, is productive in that it creates new products, whereas rent seeking destroys value by wasting valuable resources. Normally, the concept of rent seeking is applied to cases where governmental intervention in the economy leads to the creation of artificial or contrived rents. See, e.g., Robert D. Tollison, *Rent Seeking*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 315, 315–18 (Peter Newman ed., 1998) [hereinafter THE NEW PALGRAVE DICTIONARY].

25. EPSTEIN, *supra* note 12, at 7.

26. See Strine, *supra* note 18, at 81–82 (noting that with union support many states passed laws requiring workers to be paid in cash rather than scrip, and secondarily noting that several state-level labor reforms became federal law in the 1930s during the Roosevelt Administration).

27. See, e.g., Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 54 (2014) (advancing the contention that the Establishment Clause would prohibit “RFRA’s application when—as with the exemption sought by Hobby Lobby—a particular exemption would shift the costs of the accommodated religious practice to identifiable and discrete third parties in the for-profit workplace”).

28. 310 U.S. 296 (1940).

29. See, e.g., Strine, *supra* note 18, at 83 (accepting the notion that conduct remains subject to regulation for the protection of society and citing *Cantwell*, 310 U.S. at 303–04).

bly as a truly secular society and the implications of this heavily contested claim for the question of whether religious exemptions ought to be available to for-profit corporations. Part IV questions whether Supreme Court jurisprudence has reinstated corporate paternalism that somehow transforms corporate law, or alternatively strengthens corporate law by vindicating entrepreneurial choices that are made by natural persons. Of particular interest is Strine's claim that granting corporations statutory or constitutional rights is incompatible with the notion of corporate "separateness," a contention that may be difficult to square with a robust conception of the theory of the firm grounded in contractarianism and law and economics scholarship.³⁰ Part V summarizes the contradictions that compromise Chief Justice Strine's analysis. Taken as a whole, Chief Justice Strine's approach is refracted through a prism supplied by political theorists, constitutional scholars, and corporate law scholars. Such an inspection exposes the doubtful provenance of Strine's claims.

I. CHIEF JUSTICE STRINE'S ANALYSIS AND ARGUMENT

A. *Prolegomena*

Brandishing doubtful evidence of the history of employer efforts to restrict workers' freedom during the late nineteenth and early twentieth centuries,³¹ Strine brands employer hostility toward employee autonomy (economic and otherwise) as an attempt to enforce corporate paternalism³² or, alternatively, as a brazen effort to reinstitute feudalism.³³ Inflamed by employers' purported eagerness to offer a "gilded case as a substitute for personal liberty," labor advocates in the latter part of the nineteenth century, ostensibly, gave voice to employee grievances as part of the construction of a pathway leading to freedom for workers.³⁴ Strine is impressed by the early efforts of labor advocates, which were designed to address this situation, but concedes

30. For an introduction to contractarianism premised on law and economics, see Bainbridge, *Nexus of Contracts*, *supra* note 1, 9–11; *see also infra* Part IV.

31. Strine, *supra* note 18, at 77–80 (providing anecdotes in support of his claims).

32. *Id.* at 78.

33. *Id.* at 81–82.

34. *Id.* at 80–81 (explaining that labor advocates initially sought to protect workers at the state level, for example, by advocating statutes that guaranteed the right to be paid at regular intervals and to be paid in cash rather than scrip).

that the efficacy of their efforts was limited as “legal guarantees of freedom for workers evolved slowly” despite the growth of unions.³⁵ He also admits that material improvements resulting from these efforts were scattered among the several states and hardly national in scope.³⁶ Evidently, more enduring change within the domain of social progress would await the institution of President Roosevelt’s New Deal program, which ushered in fundamental changes to the pre-existing paradigm in labor-management relations.³⁷ The courts largely upheld these changes.³⁸

Then came *Hobby Lobby*, which on Strine’s reading, vests corporate employers (putatively as part of a larger proto-corporate move) with authority to exploit the least-restrictive-means test embedded in the Religious Freedom Restoration Act³⁹ (RFRA) as a means of taxing the rest of us.⁴⁰ Before fleshing out Strine’s examination of *Hobby Lobby* and *Citizens United* and their combined implications for corporate law jurisprudence, I offer a fuller account of his defense of the pursuit of “social progress” and employee autonomy in a world of scarcity.

B. *The Road to “Social Progress” and Employee Autonomy*

Strine launches his submission by asserting that a job is not a hobby because most employees in a market economy must work in order to feed, house, and otherwise provide for themselves and their families.⁴¹ Strine’s approach ferments with distaste for such commonplace motivations—motivations that have consumed the history of labor. Quotidian ambitions are deeply scorned in comparison with motivations of individuals who are

35. *Id.* at 80.

36. *See id.* at 80–81.

37. *Id.* at 82.

38. *Id.* at 83 (noting that, during the New Deal, employer objections took the form of the pursuit of exemptions or opt-outs largely within the domain of employment on grounds that funding certain “secular” causes burdened employers’ religious beliefs, but noting this move was largely unsuccessful).

39. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb. Following the Supreme Court’s decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-247, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc). Evidently, RLUIPA amended RFRA and effected a complete separation between RFRA and the First Amendment. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761–62 (2014).

40. *See Strine*, *supra* note 18, at 90, 99.

41. *See id.* at 73.

stirred to “work solely because [their] jobs fulfill all of [their] emotional, aesthetic, spiritual, avocational, or hedonic needs.”⁴² Strine reasons that work is principally understood as an imposition; most workers *must* take jobs, perhaps even a *particular* job, which thereby exposes them to the risk that they will spend a majority of their waking hours in a domain where others set the rules.⁴³ Ignoring the risk-return calculus of individuals propelled to become employees rather than entrepreneurs and asserting that before the emergence of capitalism feudalism reigned, Strine maintains that as the nation made the transition from subsistence farming to industrial capitalism, feudal practices were revived, apparently under the banner of employment-at-will.⁴⁴ However commonplace such claims may be, they assign no volitional role to individual workers themselves.

Nor does Strine grapple with the notion of scarcity, which constricts the capacity of employers and governments to provide benefits and forms of worker autonomy that Strine perceives as indispensable. Whether or not feudalism was revived during the period from the latter part of the nineteenth century to the period before the commencement of New Deal reforms (no comprehensive data is provided),⁴⁵ he remarks that putatively public-spirited labor advocates reacting to the re-ignition of feudalism’s reactionary embers sought bottom-line guarantees of economic support.⁴⁶ Countering this effort, employers, particularly during the period before the New Deal, launched a campaign to retain or expand their dominance—thus placing workers in a hazardous position.⁴⁷ This employer-led response, so the story continues, subjected workers to the possibility of “wage slavery” rather than freedom, which is defined in opposition to slavery as “a state of exemption from the power or

42. *Id.*

43. *See id.*

44. *See id.*

45. *But see* Gail L. Heriot, *The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law*, 28 GA. L. REV. 167, 167 (1993) (“I am always amused to hear the grand old tradition of employment at will referred to as a ‘feudal’ concept. In fact, it is difficult to imagine a more inapt comparison than that between feudal vassalage and employment at will.”) (footnotes omitted).

46. *See* Strine, *supra* note 18, at 73. Evidently, economic support took on the form of the minimum-wage legislation, Social Security, unemployment insurance, and worker unionization protected through the passage of the National Labor Relations Act. *See id.* at 73, 82.

47. *Id.* at 78–80.

control of another.”⁴⁸ Offering analysis that is regularly but incompletely absorbed by the notion of positive freedom rather than its negative counterpart—the right to be left alone—Strine is drawn to Professor Foner’s observation that

[e]mancipation . . . settled for all time [the] American paradox [of] the simultaneous existence of slavery and freedom, while reopening another: the coexistence of political democracy and economic dependence. And that American paradox—the meaning of freedom in a land pervaded by inequality—still bedevils our society today.⁴⁹

Whether or not inequality—as opposed to poverty—supplies a defensible metric for evaluating what bedevils society today remains a question that exceeds the scope of this Article. Suffice it to say, Professor Foner’s analysis is contestable on several levels.⁵⁰

With palpable disapproval, Strine’s jeremiad proceeds by alluding to the conduct of George Pullman and other nineteenth-century owners.⁵¹ Describing such owners as domineering tyrants who manifested their dedication to “benevolent” paternalism by insisting that workers live in company towns, Strine points out that company hierarchs kept the towns dry to ensure that liquor remained outside of the arteries of working men.⁵² At times, the conduct of some employers was driven by religious zeal, or alternatively, employers strove to use religion to enforce their values and perhaps ensure productivity.⁵³ This archetype, on Strine’s account, is embodied in the Ford Motor Company, which paid higher wages than other automobile industry employers but insisted that its workforce conform to Henry Ford’s religious and moral ideals.⁵⁴ Strine states that, as a consequence of such Ford-like efforts, American workers were obliged to work for strong-willed employers, spurring the

48. *Id.* at 78 (footnotes omitted).

49. *See id.* (quoting Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, 81 J. AM. HIST. 435, 460 (1994)).

50. *See, e.g.*, HARRY G. FRANKFURT, ON INEQUALITY 3 (2015) (acknowledging that economic inequality is one of the most divisive issues of our time but arguing that poverty is a greater evil than inequality, signifying that the poor suffer because they do not have enough, not because others have more).

51. *See Strine, supra* note 18, at 79.

52. *See id.* at 79.

53. *Id.* at 78–79.

54. *Id.* at 81.

rise of the early labor movement as a counterweight to corporate power.⁵⁵ “One of the movement’s objectives was to limit corporate paternalism [in order] to ensure that workers could spend their wages as they pleased and have some free time in which to do so.”⁵⁶ Building on this observation, Strine critiques employers who imposed inequality by paying workers in scrip, which was redeemable only at the company store.⁵⁷

Expectedly, Strine deduces that early efforts of labor reformers were inadequate in transforming the workplace. Prompted by such failures, he focuses on President Roosevelt’s New Deal, which enabled several state-level labor reforms to become federal law.⁵⁸ Erected principally on Progressive Era ideals and, more particularly, on the necessity of constitutional change,⁵⁹ the New Deal culminated in Roosevelt’s “Second Bill of Rights” speech in 1944, in which he claimed: “‘Necessitous men are not free men.’ People who are hungry and out of a job are the stuff of which dictatorships are made.”⁶⁰ Strine surrenders to the opinion that employer-led resistance to Roosevelt’s goals, as well as the contemporary opposition to FDR’s intellectual offspring, typifies the illegitimate attempt by religious and nonreligious corporations to impress their views on their employees and thus constrain the ability of the “secular” state to secure economic freedom for workers.⁶¹ The Supreme Court largely overruled employer objections during the New Deal and during much of the post-New Deal era.⁶² This adjudicatory rejection was fueled by a deference to federal statutory innovation that grew out of a broad reading of the Commerce Clause and

55. *See id.* at 80.

56. *Id.*

57. *See id.* at 73.

58. *Id.* at 82.

59. EPSTEIN, *supra* note 12, at 53–74 (describing Progressives’ efforts to enlarge the scope and reach of the Commerce Clause).

60. Strine, *supra* note 18, at 82–83 (quoting Franklin D. Roosevelt, Annual Message to Congress on the State of the Union (Jan. 11, 1944), available at http://www.fdrlibrary.marist.edu/archives/address_text.html [<https://perma.cc/GAT2-5WVC>]).

61. *See id.* at 82–85.

62. *Id.* at 83 (noting that employers sought exemptions or opt-outs from employment law initiatives on grounds that funding certain “secular” causes burdened employers’ religious beliefs).

an expansive rendering of the police power.⁶³ Offering a profuse panegyric on the New Deal and later Fair Deal reforms, Strine concentrates on legislation such as the Fair Labor Standards Act (FLSA);⁶⁴ the National Labor Relations Act (NLRA);⁶⁵ the Social Security Act;⁶⁶ and other programs.⁶⁷ He ends his peroration with FDR's observation: "We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence."⁶⁸ This contention evades the possibility that FDR's program of positive freedom enacted government paternalism, rather than freedom. Strine's remarks acclaim the "social progress" movement's subsequent embrace of healthcare as one of the "minimum essential guarantees of economic security, dignity and freedom."⁶⁹ Commending President Truman's claim that New Deal era reforms "strengthened the material foundations of our democratic ideals,"⁷⁰ Strine welcomes additional efforts, including the ambitious promise of President Kennedy's "New Frontier,"⁷¹ which culminated in an uneven effort to enact comprehensive federally mandated health care.⁷²

C. *Healthcare in the Crosshairs of the Reformers*

Strine commences his brisk survey of the American health care system by emphasizing the suspicion that the nation's current approach was prompted to evade wage controls imposed during World War II—a development that then spread under the watchful eye of the IRS in response to United States tax pol-

63. See, e.g., Richard A. Epstein, *Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence of the "Progressive Era,"* 51 VAND. L. REV. 787, 791 (1998).

64. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (proscribing payment in "scrip" and mandating minimum wage payments).

65. Pub. L. No. 74-198, 49 Stat. 449 (1935) (protecting concerted activities by workers including their right to form, join, and assist labor unions).

66. Pub. L. No. 74-271, 49 Stat. 620 (1935) (providing for old-age insurance and welfare payments for the poor).

67. See Strine, *supra* note 18, at 82–83.

68. *Id.* at 83 (quoting Roosevelt, *supra* note 60).

69. See *id.* at 85 (typeface altered).

70. See *id.* (quoting Harry S. Truman, Annual Message to Congress on the State of the Union (Jan. 5, 1949), available at <https://www.trumanlibrary.org/whistlestop/tap/1549.htm> [<https://perma.cc/4QFY-RJPJ>]).

71. See *id.* at 86.

72. *Id.* at 86–88.

icy.⁷³ Employer-based healthcare became a widespread phenomenon, but nonetheless, it left eighteen percent of employed workers and an even higher percentage of the unemployed without health insurance.⁷⁴ Highlighting gaps in health insurance coverage, Strine lauds the Affordable Care Act (ACA), under which full-time jobs generally must come with access to health insurance or, alternatively, health coverage is imposed through individual mandates.⁷⁵ Beyond mandating health insurance coverage for many Americans but exempting many others,⁷⁶ the ACA set minimum requirements, demanding that each health insurance policy cover a broad range of putatively essential health benefits including certain contraceptives.⁷⁷ Ignoring the large number of exemptions granted by the Obama administration to the ACA requirements,⁷⁸ Strine directs his fire at religious employers that are prepared to provide health insurance but object to providing the mandated contraceptive coverage.⁷⁹ The core of Strine's ire is concentrated on employers that, like the plaintiffs in *Hobby Lobby*, believe that religious freedom remains a fundamental liberty⁸⁰ and, accordingly, seek to opt out of a small fraction of the government's overall reform effort.⁸¹

73. See *id.* at 88.

74. *Id.* at 88–89.

75. See *id.* at 90.

76. See, e.g., *Hobby Lobby*, 134 S. Ct. at 2763–64 (observing that, in addition to exemptions for religious organizations, the “ACA exempts a great many employers from most of its coverage requirements. Employers providing ‘grandfathered health plans’—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act’s requirements, including the contraceptive mandate” (citations omitted)); see also BETSEY MCCAUGHEY, BEATING OBAMACARE 2014: AVOID THE LANDMINES AND PROTECT YOUR HEALTH, INCOME, AND FREEDOM 46 (2014) (noting that the Obama Administration has issued more than 1,400 waivers from ACA regulations without statutory authority).

77. Strine, *supra* note 18, at 90.

78. See *Hobby Lobby*, 134 S. Ct. at 2763–64.

79. Strine, *supra* note 18, at 90–100.

80. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1549 (8th ed. 2010) (noting that the Supreme Court during the past 50 years, commencing with *Cantwell v. Connecticut*, has held that the values protected by the religion clauses are fundamental aspects of liberty in our society and must be protected from both state and federal interference).

81. Strine, *supra* note 18, at 90–100.

D. *Opting out: The Hobby Lobby Decision and its Implications*

Strine maintains that the adverse implications of the *Hobby Lobby* decision go beyond the health insurance marketplace. He argues that the Court's decision endangers minimum wage legislation, imperils rules requiring employers to pay workers in cash rather than scrip, and jeopardizes the fair apportionment of taxes thus affording employers who oppose providing health insurance coverage on religious grounds with a judicially endorsed demand that the taxpayers foot the bill for such insurance.⁸² This move is attended by an additional first-order outrage: the demand that objecting employers be excluded from paying taxes that fund services they find offensive.⁸³ During an earlier era, in response to the emergence of an expanded social welfare state arising out of the New Deal, some employers filed objections premised on the claim that funding certain government programs "burdened their religious beliefs. In nearly every case, the [C]ourt . . . assumed the sincerity of the employer's objections, but then found that society's interest in a secular system of laws overcame them."⁸⁴ Endorsing the Court's approach in *Cantwell v. Connecticut*,⁸⁵ but not necessarily the actual opinion, Strine reasons that the Court's understanding of the Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."⁸⁶ Depending on dicta,⁸⁷ Strine maintains that *Cantwell's* discussion of the First Amendment required federal courts to subsequently disallow a series of religious objections by employers to federal social welfare and tax statutes.⁸⁸ Whether or not *Cantwell* provides a durable platform from which courts may reject employers' attempts to opt out of "socially beneficial" programs, Strine embraces both the ACA and the suggestion that the statute's subsequent collision with the fundamental liberty claims

82. *Id.* at 98–99.

83. *Id.* at 99.

84. *Id.* at 83.

85. 310 U.S. 296 (1940).

86. See Strine, *supra* note 18, at 83 (quoting *id.* at 303–04).

87. For a further discussion of Strine's dependence on *Cantwell* dicta, see *infra* Part III.

88. Strine, *supra* note 18, at 83.

brought by the three corporate entities, which made up the consolidated *Hobby Lobby* case, is unwarranted.⁸⁹

Lastly, Strine concentrates his focus on corporate law and argues that the *Hobby Lobby* decision has adverse implications for a defensible understanding of the corporate form.⁹⁰ First, he draws attention to the *Citizens United* decision, claiming that this case “creates problems for corporate law because it weakens the argument that the concerns of other corporate constituencies should be addressed by bodies of law external to corporate law” itself.⁹¹ Strine then argues that the “*Hobby Lobby* [decision] compounds those problems.”⁹² He is roused by the Court’s (alleged) selective reading of corporate law sources, which facilitates the proposition: as a general matter, for-profit corporations may treat as ends interests other than stockholder welfare, including the interests of their workers, consumers, or the communities in which the firms operate.⁹³ Although encouraging corporations to consider the welfare of their communities, consumers, and workers may advance the “social progress” that Strine treasures, he maintains that stockholder welfare (profits?) ought to be the dispositive metric for purposes of guiding (every?) corporate practice.⁹⁴ While Delaware case law⁹⁵ and corporate law scholarship support the proposition that directors ought to maximize shareholders’ wealth, the question remains whether every decision faced by the board of directors must maximize shareholder wealth.⁹⁶ Second, Strine condemns the *Hobby Lobby* decision because it “ignores basic aspects of corporate law, particularly the nature of the corporation as legally distinct from its stockholders.”⁹⁷ This contention

89. *Id.* at 90–91, 93–98.

90. *Id.* at 107–13.

91. *See id.* at 107.

92. *See id.*

93. *See id.* at 107.

94. *Id.* at 107–08 (considering corporations generally, as well as Benefit Corporations, which are available in Delaware).

95. *See, e.g.,* *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

96. *See, e.g.,* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 412 (2002) (showing that wealth maximization is often seen as a standard of conduct for directors but this norm does not stand for the proposition that courts will closely supervise the conduct of corporate directors to ensure that every decision maximizes shareholder wealth).

97. Strine, *supra* note 18, at 108.

issues forth in Strine's corporate-separateness trope as a presumably dispositive principle for examining corporate law. If this intuition is correct, the *Hobby Lobby* firms and religious corporations in general are disqualified from pursuing an exemption from generally applicable law within the meaning of either RFRA or the First Amendment.

Strine next turns his fire to the collateral consequences that ostensibly emanate from *Hobby Lobby* by, again, conjoining his inspection of this decision with the Court's recent decision allowing corporations to fund political contributions,⁹⁸ or alternatively, advertent to the Court's recent decision constraining the ability of the Affordable Care Act to expand Medicaid coverage within the jurisdiction of objecting states.⁹⁹ He emphasizes the position that there is not any essential difference between healthcare coverage and other forms of compensation. On this account, RFRA would apply to all federal statutes placing at risk some, if not all, elements of the nation's social safety net,¹⁰⁰ while threatening to vitiate the American dream of economic autonomy.¹⁰¹ More troubling to Strine is the prospect that the combined force of *Citizens United*, *NFIB v. Sebelius*, and *Hobby Lobby* neutralizes Congress's ability to further enlarge the nation's social safety net,¹⁰² thus jeopardizing the future freedom of employees who work for corporations and whose lives are influenced by corporate conduct.¹⁰³ Thus appreciated, the Court's current jurisprudence facilitates employer defiance, which comes into view as a rebirth of feudalism, a move that expands income inequality.¹⁰⁴ Such assertions imply that employers, particularly religious employers, have been roused in response to a more than a century-long escalation in the size and power of the "secular state"¹⁰⁵ to engage in a resolute effort to transmute the world of work into a redoubt of "corporate paternalism." The Supreme Court's recent jurisprudence, as

98. See *Citizens United v. FEC*, 558 U. S. 310 (2010).

99. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

100. See Strine, *supra* note 18, at 98.

101. See *id.* at 114 (discussing relevant cases that predated *Hobby Lobby*).

102. See *id.* at 76.

103. See *id.*

104. *Id.* at 75.

105. See generally JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD* 154 (2010) [hereinafter HUNTER, *TO CHANGE THE WORLD*].

thus understood, valorizes this process, elevates the rights of elites who wield corporate power,¹⁰⁶ and subordinates the so-called “Forgotten Man,” a rhetorical term that originated in the latter part of the nineteenth century and was inaptly transmuted into a social-progress trope during the New Deal era.¹⁰⁷ With that as background, the next subsection considers the issues embedded in Strine’s approach.

E. *The Issues Embedded in Strine’s Approach*

1. *Introduction*

Strine’s line of attack parallels the idea that political morality and social choice are to be based wholly or partly on some account of the rights attained by individual humans,¹⁰⁸ rights that are evidently instituted by the state premised on a largely utilitarian calculus. He develops his philosophical focus on individual rights—a move that vacillates between positive and negative liberty—without explaining the invention of the “individual” and hence the notion of individual rights, which likely arose out of sensibilities that originated largely within Christianity.¹⁰⁹ Set free from a political theology that challenges secularism, secular thought advanced by emphasizing neutrality in achieving the “Good” life.¹¹⁰ Myriad versions of the

106. Strine, *supra* note 18, at 76.

107. See AMITY SHLAES, *THE FORGOTTEN MAN* 127–28 (2008). The phrase “The Forgotten Man” was utilized to great rhetorical effect by FDR to represent the common workingman but actually arose more than fifty years before in a lecture by William Graham Sumner to represent the hidden taxpayer, the average citizen—not someone who received benefits but rather someone who paid into the government. See *id.*

108. Jeremy Waldron, *Introduction* to *THEORIES OF RIGHTS* 1, 1 (Jeremy Waldron ed., 1995) [hereinafter Waldron, *Introduction*].

109. See, e.g., LARRY SIEDENTOP, *INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM* (2014) (explaining how the ancient verging on the pre-historical period before the rise of Athens and Rome grounded its moral order in the family but that, as human communities grew larger and more complex, the center of the moral order shifted from the family to the city and thence to the fatherland but perhaps not as far as the imperium, which was ultimately challenged by apostle Paul and later Tertullian’s emphasis on freedom of conscience); see also Alan Jacobs, *Where Individuals Come From*, *BOOKS & CULTURE: A CHRISTIAN REVIEW*, 9, 9–10 (Jan./Feb. 2016).

110. See, e.g., DOUGLAS FARROW, *DESIRING A BETTER COUNTRY: FORAYS IN POLITICAL THEOLOGY* (2015); see also James K.A. Smith, *Persuasion and Public Theology*, *BOOKS & CULTURE: A CHRISTIAN REVIEW*, 116, 116–17 (Jan./Feb. 2016) [hereinafter Smith, *Persuasion and Public Theology*].

“rights” theme found fertile expression “in the liberal theories of John Locke and Thomas Paine, implicitly in the moral and political philosophy of Immanuel Kant, and at least problematically in the work of Jean-Jacques Rousseau and John Stuart Mill.”¹¹¹ A form of this rights theme can be traced to the thought of Jeremy Bentham on public morality, which he describes in his examination of the institutions and activities of government.¹¹² Moreover, the theme can be seen in the constitutional innovations of the American and French Revolutions.¹¹³ Perhaps owing a debt to this thought and, ironically enough, to the political theology of apostles and theologians,¹¹⁴ Strine’s essay can be seen as an endeavor to preserve the imprescriptible rights of workers protected in social welfare legislation, which therefore should not be pushed aside by employers (religious or not).¹¹⁵

Operating simultaneously on a number of levels, *A Job is Not a Hobby* elevates many issues. These issues are intertwined and overlap, complicating matters. However, for purposes of this response piece, I concentrate on four issues. First, Strine’s article elicits doubt whether monistic theories, such as utilitarianism, supply an appropriate decision framework within the context of a diverse society, thus enabling the polity to ascertain of what the good (liberal?) society ought to consist and by what it ought to be informed. Declining to delineate an explicit or even speculative account that fits thoroughly within the utilitarian framework offered by writers such as Jeremy Bentham,¹¹⁶ Strine proffers abundant evidence that he is tugged by the proposition that right (rational?) conduct by employers requires them to act in conformity with social-progress legislation. This proposition is manifestly entwined with the notion that employers ought to conform, without objections, to the goals of such legislation in order to maximize hedonic benefits for the greatest number of

111. Waldron, *Introduction*, *supra* note 108, at 1.

112. John Broome, *Modern Utilitarianism*, in THE NEW PALGRAVE DICTIONARY, *supra* note 24, at 651, 652.

113. Waldron, *Introduction*, *supra* note 108, at 1.

114. See Jacobs, *supra* note 109, at 9–10.

115. My debt to the authors of the *Declaration of the Rights of Man and of the Citizen* should be obvious. See DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. II (Fr. 1789); see also Waldron, *Introduction*, *supra* note 108, at 1.

116. For a brief exposition of Bentham’s thought, see Paul Kelly, *Jeremy Bentham*, in THE NEW PALGRAVE DICTIONARY, *supra* note 24, at 156, 156–61.

employees.¹¹⁷ Strine evidently transmutes the putative goals and objectives of legislation into an indisputable employee right. The sustainability of this framework is debatable. To be sure, compliance with liberal principles or rights in liberal societies that have been instantiated by progressive legal innovation might problematically be defended in terms of the rational choice exercised by citizens, a perspective, which may be compatible with the maximization of utility in Millian terms or, alternatively, in Rawlsian terms, as a rationally defensible construct for cooperation among persons having no comprehensive conception of the good in common.¹¹⁸

Putting aside for the moment Rawls' doubtful proposition and concentrating on utilitarianism in Millian terms, it is one thing to suggest that utilitarian theory can generate moral considerations that may have the special force of rights, but it is another to show that these so-called utilitarian rights have the same content as the rights that are cherished in the liberal¹¹⁹ (or perhaps pre-liberal¹²⁰) tradition that guided the Framers. Thus, an incipient conflict among theories of rights materializes—a dispute that may be irresolvable on the basis of rational analysis alone. Irresolution is foreshadowed by at least two developments. First, as John Gray observes, “If belief in human rationality was a scientific theory[,] it would long since have been abandoned.”¹²¹ Second, as Stanley Hauerwas explains, modern moral philosophy has become part of the problem as a result of its stubborn stress on autonomy, like its corresponding attempt to free ethics from history because it “produces people incapable of living lives that have narrative coherence.”¹²² If true, no solution worth defending is likely to surface regarding the appropriate metric for interpreting rights talk, a puzzle that likely infects debates regarding a wide-range of issues. Assuming *arguendo* that some form of utilitarianism can generate a philosophic consensus, this consensus, however questionable it may be, is placed under further

117. *See id.*

118. *See, e.g.,* GRAY, ISAIAH BERLIN, *supra* note 5, at 8.

119. *See* Waldron, *Introduction*, *supra* note 108, at 1.

120. *See* Deneen, *Unsustainable Liberalism*, *supra* note 8, at 28–29.

121. JOHN GRAY, *THE SILENCE OF ANIMALS: ON PROGRESS AND OTHER MODERN MYTHS* 72 (2013).

122. *See* Stanley Hauerwas, *The Virtues of Alasdair MacIntyre*, *FIRST THINGS* 35, 36 (Oct. 2007).

stress if one considers the consequences of utilitarianism on marginalized Americans.

2. *The Issues*

For the present purpose of moving my inspection of Strine's analysis forward, I shall put aside the question of whether Strine's preferred monism (some version of utilitarianism tied to employees' autonomy and economic wellbeing), or any monism, remains philosophically defensible in a diverse society. I shall instead focus first on whether Strine's conception of utilitarianism and employee autonomy delivers the goods in terms of positive consequences for marginalized workers, or instead damages the lives of so-called "unfit" workers by providing economic rents that advantage others.

Second, I will focus on Strine's controversial position on the appropriate size and legitimacy of the so-called secular state—one that is riven with empirical evidence that may indicate that the welfare costs of government failure are considerably greater than that of market failure.¹²³ The appropriate size, legitimacy, and the disputed existence of the "secular" state surfaces in questions regarding origins tied to the nation's founding documents and statements offered by the Framers. The question of origins sparks a persistent wrangle regarding the possibility, plausibility, and desirability of religious freedom in what can be called our "secular age"—one that owes much to the onset of metaphysical univocity in the thirteenth century¹²⁴ and the invention of the individual during the epoch that commenced in the first century.¹²⁵ The question of origins also assumes center stage in disputes regarding the correct interpretation of the story of religious freedom in the United States.¹²⁶ Today this

123. See, e.g., CLIFFORD WINSTON, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, *GOVERNMENT FAILURE VERSUS MARKET FAILURE* 3 (2006).

124. See, e.g., Harry G. Hutchison, *Metaphysical Univocity and the Immanent Frame: Defending Religious Liberty in a Secular Age?*, 45 *SOUTHWESTERN L. REV.* 49, 54–55, 62–82 (2015) [hereinafter Hutchison, *Metaphysical Univocity*].

125. See, e.g., SIEDENTOP, *supra* note 109, at 1.

126. For a rich exposition of the two stories of American religious freedom, see STEVEN SMITH, *supra* note 10, at 1–13 (contrasting the standard story told by elites, which maintains that America's founders were enlightened innovators, with the revised version, which suggests that religious freedom is largely a story of Christian origins that today implies religious liberty is under threat from elite adherents to the standard story).

simmering debate crystalizes itself in one outsized question: does the Free Exercise Clause or RFRA supply for-profit entities with a right of exemption from civil law to which they have religion-based objections?¹²⁷

Brooding beneath the surface of these heated statutory and constitutional debates is a third and related issue. Given that Americans live in a cultural—but not necessarily political or constitutional—epoch that James Davison Hunter describes as a “late modern, post-secular world,”¹²⁸ which finds expression in an unstable pluralism signifying a dazed, confounding, and confused milieu,¹²⁹ the proper role of corporate law in a pluralistic society of incommensurable values remains difficult to resolve. This difficulty comes alive by noting Strine’s unwillingness to defend the preservation of the “imprescriptible rights of humans”¹³⁰ who form organizations such as for-profit corporations, a potential lacuna that assumes prominence when one considers corporate theory, law and economics scholarship, and the role of entrepreneurial choice in the formation, administration, and governance of the corporate form. A thorough examination of such issues requires an in-depth assessment of Strine’s critique of *Hobby Lobby*.

Finally, I consider the role of contradiction in understanding Strine’s approach. Conflict and contradiction arguably arise because American citizens, no matter how liberal they may be, no longer respond to an agreed upon ethic or monism that provides normative coherence when discussing notions of freedom. Rather, American liberalism, which may indeed be unsustainable,¹³¹ likely has more in common with Isaiah Berlin’s understanding of freedom arising out of what John Gray calls “agonistic liberalism.”¹³² Properly appreciated, agonistic liberalism is simply a liberalism of conflict among inherently ri-

127. See Hutchison, *Metaphysical Univocity*, *supra* note 124, at 101–02.

128. Harry G. Hutchison, Lochner, *Liberty of Contract, and Paternalism: Revising the Revisionists? Review Essay: David N. Mayer, Liberty of Contract: Rediscovering a Lost Constitutional Right*, 47 IND. L. REV. 421, 423 & nn.22–23 (2014) [hereinafter Hutchison, Lochner, *Liberty of Contract*] (citing James Davison Hunter, *Law, Religion, and the Common Good*, 39 PEPP. L. REV. 1065, 1069 (2013) [hereinafter Hunter, *Law, Religion, and the Common Good*]).

129. Hunter, *Law, Religion, and the Common Good*, *supra* note 128, at 1068–69.

130. See *supra* text accompanying note 115.

131. See, e.g., Deneen, *Unsustainable Liberalism*, *supra* note 8, *passim*.

132. See GRAY, ISAIAH BERLIN, *supra* note 5, at 8.

valrous goods.¹³³ This more realistic and perhaps more sustainable understanding of liberalism arguably grounds itself on the radical choices we must make among incommensurables, not upon rational choice itself.¹³⁴ Still, if the choices we make remain incommensurable in the long term, this may place civil society at risk—a possibility that materializes in the temptation among self-interested members of the political class to capitulate to liberalism’s inamorata: authoritarianism.

II. UTILITARIANISM, PROGRESSIVE VALUES, AND THE FATE OF THE MARGINALIZED?

A. Prologue

Strine’s approach parallels analysis offered previously by other commentators¹³⁵ who have implied that progress, with its evolving respect for human dignity and autonomy, has taken a conspicuous role as “part of history’s march from feudalism.”¹³⁶ This viewpoint mirrors claims of early Progressives who subscribed to a belief that organic progress leads inevitably to a specific end for all of human history.¹³⁷ Although it is likely that Isaiah Berlin’s conception of agonistic liberalism delivers a fatal blow to existing varieties of liberal utilitarianism and perhaps even to the notion of fundamental rights and other approaches that are the stock in trade of liberal political philosophy,¹³⁸ Strine appears to accept a version of utilitarianism embedded in the New Deal’s admonition that “*Necessitous Men are Not Free Men.*” This admonishment correlates with President Roosevelt’s New Deal, as Roosevelt and his fellow liberals in Congress proposed fundamental changes to the paradigm of labor-management relations.¹³⁹ This process recalls the alleged conflict between liberty-of-contract and social-progress doctrines that rightly or wrongly have been tied to *Lochnerian* ju-

133. *Id.*

134. *Id.*

135. See, e.g., Kent Greenfield, *Corporate Law and the Rhetoric of Choice*, in 24 *LAW & ECONOMICS: TOWARD SOCIAL JUSTICE* 61 (Dana L. Gold ed., 2009).

136. *Id.* at 62.

137. See RONALD J. PESTRITTO, *WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM* 8, 10 (2005) (describing Wilson’s historicism); see also Greenfield, *supra* note 135, at 62 (describing modernity’s march).

138. See GRAY, *ISAIAH BERLIN*, *supra* note 5, at 9.

139. See Strine, *supra* note 18, at 82.

risprudence, which, on some accounts, produced a highly disputed doctrine that protected one version of individualism against its mortal enemy: majoritarian paternalism.¹⁴⁰

Nonetheless, despite employer objections, the federal government led a movement designed to ensure minimum essential guarantees of economic security, dignity, and freedom that succeeded in enacting statutory reform but did not end because, as Strine explains, the goals of this movement have now expanded to include access to healthcare as a fundamental right.¹⁴¹ Evidently Strine's vision of inexorable social progress, like Woodrow Wilson's perspective, is overwhelmed by the presumption that liberty and autonomy are not found in freedom from state action but rather in one's obedience to the laws of the administrative state.¹⁴² Although Part V disputes such views directly, Strine accepts this viewpoint, one that is instituted through changes in positive law and one that likely reflects majoritarian paternalism. To be clear, this viewpoint at times appears to offer a contrast with Strine's oft expressed zeal to defend employee-individual autonomy, a goal that Justice Holmes saw as the enemy of desirable social progress reflected in dominant opinion.¹⁴³ Whether this tension represents a conflict or contradiction that is fatal to Strine's approach, he remains fixated by the contention that employer objections to social-progress legislation are unwarranted. But even if that were true and even if *Hobby Lobby* and *Citizens United* stand for an unwise expansion of corporate power and a reversion to corporate paternalism, his analysis should be subjected to close examination that bears on the question of whether the expansion of the administrative state and its majoritarian and utilitarian goals have managed to expand freedom and autonomy or diminish them. Otherwise framed, the question becomes, does progressive thought stand as a paragon of progress or of entrenched power that inevitably provides private benefits as opposed to public ones? This is the question to which I now turn.

140. See, e.g., DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 44 (2011) (explicating the intense opposition to individualism expressed by leading Progressives and explaining Progressives' equally intense support for majoritarian paternalism).

141. See Strine, *supra* note 18, at 85–88 (explaining this movement).

142. See PESTRITTO, *supra* note 137, at 7.

143. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (favoring a restriction of individual liberty).

B. *The Consequences of the Pursuit of "Social Progress"*

As I have noted elsewhere, the "Progressive Era surfaced at the federal level during President Theodore Roosevelt's administration in response to the Gilded Age and became reified by the New Deal."¹⁴⁴ Although Progressives saw themselves as leaders of a novel movement, it is clear that the Progressive movement was "based on the paternalistic and collectivist threads that ran deeply through the Anglo-American common-law tradition."¹⁴⁵

Like the Fabian socialists, their counterparts in Britain, who harkened back to the "Tory paternalism" of the 18th century, American Progressives championed various "protective" labor laws (particularly regarding women, children, and other supposedly vulnerable classes of workers), liquor prohibition and other forms of paternal morals legislation, and in general a category of laws called "social legislation" by modern scholars.¹⁴⁶

"Progressive ideals, infused with Herbert Spencer's thinking, were 'essentially a variant of English utilitarianism, with a more developed argument on progress through evolution.'"¹⁴⁷ In Spencer's account, "progress" was "not an accident, but a necessity. Surely must evil and immorality disappear; surely must men become perfect."¹⁴⁸ Although Darwinian thought, as exemplified by Spencer, could be taken in either a laissez-faire or statist direction, Progressives rejected the notion of a republic grounded on the natural-rights tradition in favor of living constitutionalism as they pursued fundamental change in the structure of society as part of an evolution from the free market.¹⁴⁹ This maneuver coincides with the onset of authoritarianism that appears to infect modern democracies, a tendency that philoso-

144. See Harry G. Hutchison, *Choice Progressive Values and Corporate Law: A Reply to Greenfield*, 35 DEL. J. CORP. L. 437, 467 (2010) [hereinafter Hutchison, *Choice, Progressive Values, and Corporate Law*].

145. DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 55 (2011).

146. *Id.*

147. Hutchison, *Choice, Progressive Values, and Corporate Law*, *supra* note 144, at 467 (quoting PESTRITTO, *supra* note 137, at 11).

148. See, e.g., PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD 5 (40th Anniversary ed., 2006) (quoting HERBERT SPENCER, SOCIAL STATICS 32 (1892)).

149. Hutchison, *Choice, Progressive Values, and Corporate Law*, *supra* note 144, at 467.

pher John Gray exposes. Gray's critique shows that often the mission of the modern state is to satisfy the private preferences of collusive interest groups rather than provide the pure public good of civil peace, thereby unleashing the prospect that existing social and economic power in western democracies will be defended by private interest groups in the name of the public interest.¹⁵⁰ Gray shows that modern states overwhelmingly fail to promote the public interest against the classical conception of the state as the "provider of public goods—goods, that is to say, which in virtue of their indivisibility and non-excludability must be provided to all or none—*modern states are above all suppliers of private goods.*"¹⁵¹ Thus appreciated, Progressive thought and the evolution of the modern state, beyond its implicit commitment to some version of collective progress or collectivism, supply a questionable basis for the social reform that Strine craves. This contention gains added weight when the Progressive Era and the New Deal are briefly examined.

Scholars David Bernstein and Thomas Leonard establish that the Progressive Era stemmed from both conservative and liberal ideas.¹⁵² Evidently some of these ideas were grounded in quasi-science,¹⁵³ a movement that reflected the "modern spirit," which was deeply impatient with limits and which, correspondingly, assumed the perfectibility of man and the conquerability of nature.¹⁵⁴ Progressive ideals and policies, however antique as they may be, surfaced first in Great Britain and spread to the United

150. See JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 10–11 (rev. ed., 1996) [hereinafter GRAY, *POST-LIBERALISM*].

151. *Id.* at 11.

152. David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 *LAW & CONTEMP. PROBS.* 177, 179 (2009).

153. As Edwin Black shows, "[s]cience offers the most potent weapons in man's determination to resist the call of moral restraint" and accordingly, many Progressives took the lead in forging a new science of human oppression: race science. See BLACK, *supra* note 13, at 9. Grounded in this view, Progressives sought to link socioeconomics, philosophy, biology, and the law in order to change the world, perhaps forever. See *id.* This linkage "rem[ade] undesirables into the hereditarily unfit and elevat[ed] exclusion to a matter of national and racial health." Bernstein & Leonard, *supra* note 152, at 177. Progressive architecture frequently sought the exclusion of "defective" groups from American labor markets with the justification that "unfit workers wrongly lowered the wages and employment of racially superior groups." *Id.*

154. Paul Seaton, *Translator's Preface* to CHANTAL DELSOL, *UNJUST JUSTICE: AGAINST THE TYRANNY OF INTERNATIONAL LAW* vii (Paul Seaton trans., 2008).

States and were spawned, at least in part, by the belief that scientific experimentation inevitably leads to human and societal improvement.¹⁵⁵ Within the boundaries of the United States these currents emphasized both the Ionian Enchantment¹⁵⁶ and biological determinism;¹⁵⁷ these inclinations were fostered by “creative extensions of the police power and commerce power.”¹⁵⁸ At the same time, the liberty interest of individuals was subject to a contraction that mirrored Justice Holmes’ dissent in *Lochner v. New York*,¹⁵⁹ which supported a constrained conception of the Fourteenth Amendment and was fortified by an expansive understanding of the “common interest.”¹⁶⁰ Taken as a whole, this analysis implied that human liberty “did not mean freedom from government coercion and control.”¹⁶¹

Since power tends naturally toward manipulation and control,¹⁶² it would be unfair to claim that public intellectuals and institutions operating during the Progressive Era invented contempt as a weapon against the unwanted, but accurately understood, Progressive ideas were liberal in their concentration on uplifting certain members of disadvantaged classes and conservative in the calculated conclusion that certain people—women, blacks, and immigrants—were unworthy of social uplift.¹⁶³ Among the favored groups, of course, were Caucasian American males.¹⁶⁴ Emphasizing society’s need to control the unfit—women and members of minority groups¹⁶⁵—Progressive intellectuals turned New Dealers refrained from concentrating on the public interest.¹⁶⁶ Some but not all Progressives emphasized racial purity or gender superiority. Progressive icon Woodrow Wilson, for example, insisted that giv-

155. Harry G. Hutchison, *Waging War on the “Unfit”?: From Plessy v. Ferguson to New Deal Labor Law*, 7 STAN. J. C.R. & C.L. 1, 2–6 (2011) [hereinafter Hutchison, *Waging War on the “Unfit”?*].

156. *Id.* at 2.

157. *Id.* at 2–3.

158. *Id.* at 5.

159. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

160. Hutchison, *Waging War on the “Unfit”?*, *supra* note 155, at 18.

161. *Id.* (quoting PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* 164 (2008)).

162. HUNTER, *TO CHANGE THE WORLD*, *supra* note 105, at 188.

163. Bernstein & Leonard, *supra* note 152, at 180–83.

164. *Id.* at 188.

165. *Id.* at 180–83.

166. See EPSTEIN, *supra* note 12, at 72.

ing blacks the right to vote was “the foundation of every evil in this country.”¹⁶⁷ During his presidency, as part of an effort to hasten the demise of African American aspirations, Wilson ordered the re-segregation of government offices in 1913.¹⁶⁸ Other Progressives—largely on sociological grounds—led the effort to limit the hours and occupational choices available to women.¹⁶⁹ While Strine defends wage and hour initiatives arising out of state efforts that eventually culminated in the enactment of FLSA,¹⁷⁰ he fails to explain why the percentage of children in the workforce declined consistently *before* the regulation of child labor¹⁷¹ or why social-progress statutes limiting the hours of work for women were successfully defended by Progressives on grounds of innate female inferiority.¹⁷² Nor does Strine, a defender of minimum-wage regimes, notice that minimum-wage regulation operating under the auspices of the New Deal’s National Industrial Recovery Act (NIRA) and FLSA managed to intensify economic inequality by destroying the jobs of more than half a million blacks.¹⁷³ Neither does Strine explain how labor unions and employer cartels took full advantage of the New Deal’s regulatory impulse to further entrench their power by excluding African Americans from employment.¹⁷⁴ Nor does he explain FDR’s success in creating Japanese internment camps and virtual slave camps for African Americans and others during World War II.¹⁷⁵

167. JONAH GOLDBERG, *LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING* 84 (2009).

168. Jonathan Bean, *Republicans and Race (1921–1932)*, in *RACE & LIBERTY IN AMERICA: THE ESSENTIAL READER* 137, 154 (Jonathan Bean ed., 2009) (contrasting President Wilson’s conduct with President Hoover’s actions designed to reduce segregation).

169. EPSTEIN, *supra* note 12, at 90.

170. Pub. L. No. 75-718, 52 Stat. 1060 (1938).

171. See EPSTEIN, *supra* note 12, at 62.

172. See *id.* at 90.

173. See Hutchison, *Choice, Progressive Values and Corporate Law*, *supra* note 144, at 471 n.232.

174. See *id.* at 474.

175. See RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 1–3 (2007) (describing the creation of virtual slave camps for African Americans during FDR’s watch). Nor does Strine explain why FDR and the liberals in his administration refused admittance of Jewish refugees fleeing the Holocaust to the United States, notwithstanding the government’s knowledge of Hitler’s “Final Solution,” meaning that the U.S. government acquiesced in the murder of the Jews. For an incisive

Responding to the force of regulatory subordination tied to bipartisan enthusiasm for Progressive values, T. Arnold Hill of the National Urban League wrote that, “[i]f the present trend continues, there is slight question that the Negro will be gradually forced into condition of economic peonage, every bit as devastating as plantation slavery ever was.”¹⁷⁶ Thus the entire Progressive record—from the Progressive Era, to the New Deal, to now—yields convincing evidence that social renovators frequently succeeded in excluding “immigrants, African Americans, [and] women” from the labor force through government-sponsored paternalism that appears far worse than the so-called corporate paternalism that animates Chief Justice Strine.¹⁷⁷ Consistent with these claims, it appears that liberal, Progressive policies have imposed dreadful effects on workers who were often seen as either “unfit” for work or otherwise “unemployable.”¹⁷⁸ Such effects have contributed tangibly to poverty, inequality, and subordination in the context of the nation’s history.¹⁷⁹ For example, during both the early and late twentieth century, labor organizations, the beneficiaries of New Deal labor laws, institutionalized discriminatory practices at the expense of African American workers.¹⁸⁰ As a result, the “widening unemployment gap between white and black Americans that commenced during the Great Depressions remains with us today,”¹⁸¹ and much of this gap can be attributed to the enactment of social-progress legislation in the realm of labor and employment reform arising out of the New Deal.¹⁸²

discussion of this issue, see Stuart J. Roth, *The Politics of Turkey During the Holocaust*, 1 J. OXFORD CTR. STUDY L. & PUB. POL’Y 87, 116–19 (2015).

176. DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 107 (2001).

177. Bernstein & Leonard, *supra* note 152, at 180.

178. Hutchison, *Waging War on the “Unfit”?*, *supra* note 155, at 20–34.

179. See generally *id.*

180. See Harry G. Hutchison, *Work, the Social Question, Progress and the Common Good*, 48 J. CATHOLIC L. STUDIES 59, 103–05 (2009) (book review) (linking the American labor movement to racist oppression).

181. Harry G. Hutchison, *Achieving Our Future in the Age of Obama?: Lochner, Progressive Constitutionalism, and African-American Progress*, 16 J. GENDER, RACE & JUSTICE 483, 512 (2013) [hereinafter Hutchison, *Achieving Our Future?*] (quoting Harry G. Hutchison, *Racial Exclusion in the Mirror of New Deal Responses to the Great Crash*, 15 NEXUS J. 5, 13 (2009–2010) (book review)).

182. Hutchison, *Achieving Our Future?*, *supra* note 181, at 510–13.

“Concurrently, New Deal Progressives provided special favors for ‘Big Business’ and others.”¹⁸³ Importantly:

[M]any theories regarding the growth of government point to the ability of governments to exploit periods of crisis, especially those massive enough to engender constitutional change, in order to “expand their powers beyond what is necessary to resolve the crisis at hand.” Constitutional changes, during periods of crisis, often provide an opportunity to redistribute power and wealth to powerful interest groups—Big Business, Big Labor, and Big Lobbyists—which consequently disfavor truly disadvantaged citizens.¹⁸⁴

Hence, “the Progressive move toward a centralized, regulatory-administrative state glossed over the corrupting tendency of power” unhindered by constitutional restraint.¹⁸⁵ Consistent with this authoritarian impulse and John Gray’s analysis, it appears that as a consequence of the Progressive Era, the New Deal, and the Fair Deal, the size and scope of government has grown dramatically in a move that cripples civil society.¹⁸⁶

This Article’s inspection of Progressive Era thought and New Deal invention, reinforced by reference to the toxic evidence of subordination associated with the 1930s Davis-Bacon Act,¹⁸⁷ is buttressed by contemporary evidence showing that minimum-wage regimes “currently disfavor the poor by increasing the number and percentage of unemployed workers coming from lower-class families while disproportionately supplying benefits (higher wages) to young people living in middle-to-upper class families,” an outcome that leaves many African Americans out in the cold.¹⁸⁸ Thus, it is highly likely that Strine’s defense of the

183. Hutchison, *Choice, Progressive Values and Corporate Law*, *supra* note 144, at 474 (citing Jonah Goldberg, *The Raw Deal*, 8 CLAREMONT REV. BOOKS 16, 16 (2007) (reviewing AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* (2007))).

184. Hutchison, *Achieving Our Future?*, *supra* note 181, at 491–92 (quoting Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 599 (2003)) (footnotes omitted).

185. Hutchison, *Choice, Progressive Values and Corporate Law*, *supra* note 144, at 474–75 (footnote omitted).

186. See HUNTER, *TO CHANGE THE WORLD*, *supra* note 105, at 154 (suggesting that the “state has permeated civil society to such an extent that the two are mostly indistinguishable”).

187. See, e.g., Hutchison, *Choice, Progressive Values and Corporate Law*, *supra* note 144, at 476.

188. *Id.*

expansionary state exposes him to the charge that he has failed to develop a principled theory of power entrenchment. This failing enables him to inadvertently or deliberately defend powerful interests while simultaneously ignoring the fact that many individuals and groups have suffered far more at the hands of the government's regulatory coercion than from the hands of employers who, like the respective firms in *Hobby Lobby*, simply wish to be left alone. Such evidence exposes Strine to the grounded charge that his policy preferences manifest themselves as an inversion that favors the rich.¹⁸⁹ To repeat, America's ongoing process of exclusion, often cloaked in social justice speech,¹⁹⁰ may ultimately diminish rather than contribute to economic autonomy for many workers.¹⁹¹

This process proceeds presently. Although proof of cause and effect remain difficult, it should surprise no one that Big Pharma has spent millions of dollars and employed armies of lobbyists in recent years in calculated efforts to ensure that the rest of us are paying the price for their success.¹⁹² As explicated by John Gray, "[c]orporate interests and pressure groups are continuously active by lobbying, colonization, cooptation of regulatory authorities, or through intentional efforts to corrupt politicians, in order to mold these rules to suit their own highly politicized selfish interests."¹⁹³ If John Gray is correct, no one should be surprised that Big Pharma helped President Obama pass the ACA, which, according to one calculation, means that they will reap billions in additional profits and tens of billions in market value¹⁹⁴—a move that would signify that the soft plaster of the ACA's social-progress platform has been eroded by hard facts. Whether or not the passage of the ACA will fully enable Big

189. *See id.* at 477.

190. *Id.* at 476–77 (explaining how the interests of disadvantaged workers were sacrificed through labor law reform initiatives in order to favor the affluent).

191. Hutchison, *Achieving Our Future?*, *supra* note 181, at 492.

192. *See* Wendell Potter, *Big Pharma's Stranglehold on Washington*, CTR. FOR PUB. INTEGRITY (Feb. 11, 2013), <http://www.publicintegrity.org/print/12175> [<https://perma.cc/YHP3-TBZ8>].

193. Hutchison, *Achieving Our Future?*, *supra* note 181, at 522 (citing GRAY, *POST-LIBERALISM*, *supra* note 150, at 12).

194. Bruce Japsen, *Obamacare Will Bring Drug Industry \$35 Billion In Profits*, FORBES (May 25, 2013, 10:29 AM), <http://www.forbes.com/sites/brucejapsen/2013/05/25/obamacare-will-bring-drug-industry-35-billion-in-profits/#4e654d63b7fe> [<https://perma.cc/6CAL-XRW7>].

Pharma to extract economic rents as planned,¹⁹⁵ Strine defends the passage and full enforcement of the ACA on social-progress grounds against a group of relatively small employers (employers whose size is dwarfed in comparison with the size of large pharmaceutical firms) who seek an exemption within the meaning of RFRA. Strine is unwilling to admit what Gray has shown:

Rather than simply sustaining the peaceful coexistence of civil associations, the state has become “an instrument of predation, the arena within which a legal war of all against all is fought out.” In this survival-of-the-fittest world, the rules of civil association—the laws specifying property rights, contractual liberties, and acceptable modes of voluntary association, which ought to restrain the state—are now themselves objects of capture by individuals and groups claiming that their self-interested pursuits are actually in the public interests, or alternatively are driven by fairness or the exigencies of the nation’s progress.¹⁹⁶

If these claims and contentions are accurate, even charitable observers must conclude that this overall process—enabling economic rents for highly successful firms and their shareholders while opposing religious or other exemptions for smaller ones—resembles Progressive Era programs established during the New Deal—programs that facilitated cartels and redistributed income from disadvantaged workers to already-advantaged groups. Although charity commends muted commentary, it is possible that this process—fused with a patina of social justice rhetoric—resembles a masquerade.¹⁹⁷ This does not necessarily indicate that Strine or other contemporary liberals are committed to intentional subordination, which has often animated the Progressive Era. Rather, good intentions, however laudable they may be, do not prevent the subordinating consequences of Progressive policies from continuing.

Taken as a whole, Strine’s version of social-progress utilitarianism, in terms of both its normative claims and its consequences,

195. See *Big Pharma’s ObamaCare Reward*, WALL ST. J. (Feb. 5, 2015), http://www.wsj.com/article_email/big-pharmas-obamacare-reward-1423180690-IMyQjAxMTI2MzA2MjQwNTI1Wj [<https://perma.cc/8U7P-U8HD>].

196. Hutchison, *Achieving Our Future?*, *supra* note 181, at 522 (quoting GRAY, *POST-LIBERALISM*, *supra* note 150, at 12).

197. Hutchison, *Choice, Progressive Values and Corporate Law*, *supra* note 144, at 477.

is highly questionable. On close inspection, the policies he endorses yield to the possibility that they expand, rather than contract, paternalism and income inequality. If true, authentic social progress may have to await a shrinkage in state power rather than its further accretion. As the next Part illustrates, the growth in state power has consequences for the free exercise of religion—an issue that consumed countless debates during the nation’s Founding and remains contentious to this day.

III. RELIGIOUS LIBERTY CABINED BY THE GROWTH IN THE “SECULAR STATE”?

Any intelligible effort to define the proper relationship between government and religion is a thorny enterprise that has vexed jurists, clerics, and governments for centuries.¹⁹⁸ The idea of a truly secular society may emerge as a cultural artifact that surfaces in what Charles Taylor calls the “immanent frame.”¹⁹⁹ Although the footings for this orientation may be provided by exclusive humanism, and while such a foundation may generate questions regarding the need for the sacred,²⁰⁰ nevertheless, it remains questionable whether a truly secular society is possible.²⁰¹ Indeed, Rémi Brague richly disputes the possibility of

198. See generally PETER L. BERGER, *THE MANY ALTARS OF MODERNITY: TOWARD A PARADIGM FOR RELIGION IN A PLURALIST AGE* (2014).

199. JAMES K.A. SMITH, *HOW (NOT) TO BE SECULAR: READING CHARLES TAYLOR 92* (2014) [hereinafter JAMES SMITH]. The “immanent frame” is a metaphor that captures the cultural world we now inhabit wherein this mental frame constitutes a natural order, one of exclusive humanism as against the possibility of living within a transcendent or supernatural world. *Id.*

200. *Id.*

201. See Rémi Brague, *The Impossibility of Secular Society: Without a Transcendent Horizon, Society Cannot Endure*, *FIRST THINGS* 27, 27–28 (Oct. 2013). Brague offers two-and-a-half theses: (1) a purely secular society simply cannot survive in the long run and thus leaving behind secularism is a necessary move; (2) the term “secular society” is tautological because the ideal of secularity is latent with the modern usage of the term; and (2.5) whatever comes after “secularism,” it won’t be a “society” any longer but rather another way for us to think about and give political form to the being-together of human beings. *Id.*; see also JAMES SMITH, *supra* note 199, at 142 (describing Taylor’s account of three types of secularity wherein (1) secularity conforms to a so-called traditional “definition of the secular, as distinguished from the sacred—the earthly plane of domestic life” in a domain that honors the sacred; (2) secularity offers a “more ‘modern’ definition of the secular as areligious—neutral, unbiased, ‘objective;’ and (3) secularity, which is identified as an age “of contested belief, where religious belief is no longer axiomatic”).

such a society,²⁰² and Strine declines to prove its existence. Nonetheless, Strine contends that the *Hobby Lobby* case, in combination with the Supreme Court's earlier decisions involving corporations,²⁰³ improperly constricts government's capacity to extend the social safety net further.²⁰⁴ Embarking on an effort to illustrate that "*Hobby Lobby* puts great pressure on corporate law itself,"²⁰⁵ he avers this pressure was not required by RFRA.²⁰⁶ Presumably, *Citizens United* and *Hobby Lobby* combine to inflate the power of corporations through contestable interpretations of both the First Amendment and RFRA. Strine insists that such judicially cognized corporate resistance enables religious employers in particular to avoid the adverse effects of otherwise generally applicable social-progress law and thus poses an insidious threat to the nation's workers, the survival of the secular state, and responsible corporate law itself.²⁰⁷

Presenting a fulsome parade of horrors, Strine reacts to this situation with resolute conviction. He asserts that the nation is unqualifiedly secular and accordingly must enforce secular principles.²⁰⁸ This contention appears to be at variance with John Locke's conception of the state,²⁰⁹ but it corresponds with Professor Larry Siedentop's question: have the people of 'the West,' inhabiting what some call the "post-Christian world," lost their moral bearings?²¹⁰ If Siedentop's question is answered affirma-

202. See Brague, *supra* note 201, at 27–28.

203. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); *Citizens United v. FEC*, 558 U.S. 310 (2010).

204. See Strine, *supra* note 18, at 90–100, 107–13.

205. See *id.* at 112.

206. See *id.* at 115.

207. See *id.* at 107. Strine has previously observed that *Citizens United* creates problems for corporate law because it weakens the argument that the concerns of other corporate constituencies should be addressed by bodies of law external to corporate law. *Id.* (citing Leo E. Strine, Jr., & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335 (2015)). Now, he argues that *Hobby Lobby* compounds those problems. See Strine, *supra* note 18, at 107.

208. See Strine, *supra* note 18, at 76, 113–14.

209. See JOHN LOCKE, LOCKE'S TWO TREATISES OF GOVERNMENT 223 (Peter Laslett ed., 2d ed. 1967) (proffering an approach that combined Protestant affirmation of ordinary life with the ideal of rational self-control—a move replete with the claim that Reason is the voice of God); see also RON HIGHFIELD, GOD, FREEDOM & HUMAN DIGNITY: EMBRACING A GOD-CENTERED IDENTITY IN A ME-CENTERED CULTURE 23–24 (2013).

210. See SIEDENTOP, *supra* note 109, at 1.

tively, it means that Americans, living in a nation wherein religious freedom was once of paramount importance, may “no longer have a persuasive story to tell ourselves about our origins and development.”²¹¹ Although such questions do not constitute an autopsy, it is possible that “[s]ome may welcome this condition, seeing it as liberation from historical myths such as the biblical story of human sin and redemption . . . [thus rendering the] Western narrative not only obsolete, but morally dubious.”²¹² Consistent with Siedentop’s observations (but not his conclusions),²¹³ rather than being exercised by the importance of religious freedom, Strine is exercised by the prospect that “social progress” may be thwarted. Whether or not human and social progress is possible,²¹⁴ Strine repeatedly ties freedom to the elimination of necessity and human want.²¹⁵ Such contentions implicitly deny the notion of scarcity, a position held despite the fact that all of us, including employers and employees, have unmet needs. Apparently such claims are lubricated by allegations that private actors possess unwarranted market power, which surfaces when private individuals and entities pursue policies and private ordering that supplies benefits to them at the expense of the public interest. Although the reliability of market failure allegations remains debatable, it is manifest that Progressives, in responding to this hypothesis, have facilitated a rise in the size and scope of government, and accordingly, “the odds of escaping conflicts between religious groups and individuals on one hand and the state on the other are terribly low.”²¹⁶

This remains true despite the fact that a quest for religious freedom motivated many of America’s founders to seek protection for human liberty in the form of the Free Exercise Clause or other proposals.²¹⁷ On the other hand, powerful elites²¹⁸ within the Latin West react to such claims “with a shrug, be-

211. *Id.*

212. *Id.*

213. *Id.* (expressing disagreement with the claim that the Western narrative is obsolete and morally dubious and pointing out that if one looks at the West against a global background, the West is in a competition, like it or not).

214. See Strine, *supra* note 18, at 115.

215. See, e.g., *id.* at 83.

216. Hutchison, *Metaphysical Univocity*, *supra* note 124, at 72.

217. *Id.* at 54.

218. See, e.g., Patrick Deneen, *The Power Elite*, FIRST THINGS 17–19 (June/July 2015) [hereinafter Deneen, *The Power Elite*].

believing that religion is simply a form of superstition representing the residue of an unwanted and intolerant meme” grounded in the presumption that religious zeal belongs to the primitive and uneducated while nonbelief or private belief belongs to the more advanced among us.²¹⁹ Progressive hierarchs seem primed to capitulate to this conceit no matter how much the founding documents of the United States accurately reflect a tension between secular values and religion,²²⁰ perhaps because elites do not wish to see any barrier to the ambitions of the expansionary state. In our contemporary epoch, this tension reflects two stories—one of religious freedom²²¹ and the other of clashing values.²²² These stories arose in part due to deism, the intellectual movement that dominated eighteenth-century philosophy.²²³ This tension signals a conflict between incommensurable principles that is lucidly reflected in the writings of Tocqueville and others.

A short time after reaching the New World, Tocqueville was greeted by a flurry of conflicting impressions.²²⁴ Arriving after Thomas Jefferson released his proclamation that the religion clauses created a wall of separation between church and state,²²⁵

219. Hutchison, *Metaphysical Univocity*, *supra* note 124, at 51.

220. See, e.g., Aristide Tessitore, *Alexis de Tocqueville on the Incommensurability of America's Founding Principles*, in *DEMOCRACY AND ITS FRIENDLY CRITICS: TOCQUEVILLE AND POLITICAL LIFE TODAY* 59 (Peter Augustine Lawler ed., 2004) (describing Tocqueville's initial impressions upon arriving in the United States and characterizing the nation as having two foundings: one rooted in biblical religion and the other in secular philosophy).

221. See STEVEN SMITH, *supra* note 10, at 1–13 (contrasting the standard story told by elites that says America's founders were enlightened innovators with the revised version suggesting religious freedom is largely a story of Christian origins that today implies religious liberty is under threat from elite adherents to the standard story).

222. See, e.g., MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 1–12 (2013). DeGirolami shows that legal theory seeks to fix crystalline conceptual categories, but the social practice of religious liberty is resistant to legal theory's self-assured, single-minded drive to evaluate, justify, and adjudge. In light of this conclusion, he further offers a middle course in examining religious liberty that is grounded in tragedy and history (premised on the legal and social traditions of the nation) and attempts to respond to the plurality of ideas about religion itself and the state's proper relationship to them. This process does not concede that constitutional fidelity and the rule of law are damaged even when judges are forthright in confronting the clashing values that underwrite so many religious liberty cases. See *id.*

223. See HIGHFIELD, *supra* note 209, at 26.

224. Tessitore, *supra* note 220.

225. See Letter from Thomas Jefferson, President of the United States, to Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, Comm. of the Danbury Bap-

but perhaps contemporaneously with the evolution of the idea of separation between church and state less as constitutional doctrine commanded by the text and more as a form of anti-Catholic ideology,²²⁶ Tocqueville traces this simmering conflict to its root:²²⁷ "a nation characterized not by one but by two foundings, each of which is drawn from a radically different source— biblical religion and secular philosophy."²²⁸ Evidently, Tocqueville's thesis anticipates the persistence of conflict for future generations.²²⁹ While Tocqueville's perspective may not supply a sufficiently comprehensive perspective for all observers,²³⁰ partly because he saw secularism as a distinct occurrence standing apart from its origins in developments that derived from religion itself,²³¹ it is arguably true that secularism "has gained ground at the expense of its rival."²³² Thus, he signifies the ascendancy of a lexicon dominated by such terms as individualism, tolerance, progress, neo-Darwinian atheism, and antireligious scientism.²³³

Supplementing this analysis, Professor Steven Smith submits an examination of American religious freedom that echoes some of Tocqueville's observations. He finds that there are two distinct stories of American religious freedom.²³⁴ First, he explains the standard story, one that is consistent with Chief Justice Strine's intuitions: "The *standard story* . . . tells us how, under the influence of the Enlightenment, the American founders broke away from the intolerance and dogmatism of centuries of Christendom and courageously set out on a radical new experiment

tist Ass'n (Jan. 1, 1802), in 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281–82 (A. Lipscomb ed., 1903).

226. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 231 (2000).

227. See Tessitore, *supra* note 220, at 59.

228. *Id.*

229. *Id.*

230. See, e.g., Hutchison, *Metaphysical Univocity*, *supra* note 124, at 62–73 (suggesting that one source of doubt surfaces in light of the ascension and appropriation of metaphysical univocity and its corresponding rejection of a non-univocal or inherited view of God as a distinct entity or order of being).

231. *Id.* at 71.

232. WILSON CAREY MCWILLIAMS, REDEEMING DEMOCRACY IN AMERICA 55 (Patrick J. Deneen & Susan J. McWilliams eds., 2011).

233. *Id.*

234. See STEVEN SMITH, *supra* note 10, at 1–13.

in religious liberty.”²³⁵ This movement “valorizes the presumptive appeal of progress” and simultaneously “elevates one or more of the several explanations and descriptions of secularization.”²³⁶ As this story goes, “the [F]ounders adopted a Constitution that committed the nation to the separation of religion from government and thus to secular governance that would be neutral toward religion.”²³⁷ Yet these enlightened commitments were not immediately consummated until the Supreme Court “finally undertook to realize the promise of the First Amendment’s commitment to religious freedom and religious equality,” presumably embedded in the standard story.²³⁸

By contrast with the standard story of religious freedom, Professor Smith offers a *revised story*, one that “begins in late antiquity with the emergence of a new religion—Christianity—with distinctive commitments to a separation of spiritual and temporal authorities and to an inner, saving religiosity that was of necessity sincere and voluntary.”²³⁹ Smith contends that “[t]hese themes, together with a commitment to openness and contestation between perennial providentialist and secularist interpretations of the nation, constituted the distinctive American settlement of the problem of religious pluralism.”²⁴⁰ On this account, “the American embrace of church-state separation . . . is best understood not as radical innovation but rather as a retrieval and consolidation of these classical commitments (with a measure of easygoing pagan toleration mixed in).”²⁴¹

Taken together, both the standard (enlightened) story and the revised story agree that religious freedom is presently under threat, but the source of this struggle is in dispute.²⁴² The revised story—the one that is more consistent with Professor Smith’s understanding of the American settlement—underscores James Madison’s defense of religious freedom as a “right,” which meant something more to him than we might mean today: “merely a privilege or immunity that govern-

235. *Id.* at 167 (emphasis added).

236. Hutchison, *Metaphysical Univocity*, *supra* note 124, at 53.

237. STEVEN SMITH, *supra* note 10, at 167.

238. *Id.*

239. *Id.*

240. *Id.* at 167–68.

241. *Id.* at 167.

242. Hutchison, *Metaphysical Univocity*, *supra* note 124, at 53–54.

ments may (or may not) choose to confer, or an 'interest' that should be assigned significant 'weight' in political or judicial 'balancing.'"²⁴³ Religion, said Madison, was free in the sense that it was a domain "wholly exempt from [government's] cognizance."²⁴⁴ Madison reminds us that failure to respect this right in its jurisdictional sense signifies that "all other rights will likewise be imperiled" and that rights will generally be transmuted into nothing more than "appeals to the benevolence and good grace of the government," a move that would place employers' liberty interest in the crosshairs of the state.²⁴⁵ Consistent with this instinct, "states that fail to protect religious freedom usually trample on other freedoms, too."²⁴⁶ If Professor Smith's account of religious freedom and Tocqueville's understanding of the nation's founding is accurate, then Strine's adamant conception of America as a "secular" state galloping toward "social progress," as well as his commitment to shrinking the power and religious-liberty interests of employers by correspondingly expanding the power of the state, become highly contestable.

Nor is it likely that Strine's conception of the secular state can be rescued by resorting to reason and rationality as a monistic guide for settling disputes, despite the fact that some commentators aver that reason as a politically neutral ideal is capable of steering the ship of state away from the shoals of fragmentation. This is so for several reasons. First, the conceit of pure reason, ostensibly at the heart of the West, is currently under stress.²⁴⁷ Second, the secularists'

conceptions of history and the conventional historical periodizations—Antiquity, the Middle Ages, and Modernity—rest on an ahistorical logic that was invented by late medieval secular reason and progressively instituted by the forces of Protestant confessionalization and the Enlightenment. In positing absolute historical breaks—which in reality were entirely avoidable, contingent, and arbitrary—this logic is

243. STEVEN SMITH, *supra* note 10, at 169.

244. *Id.*

245. *Id.* at 169–70.

246. Rajeev Bhargava, *Rehabilitating Secularism*, in *RETHINKING SECULARISM* 92, 99 (Craig Calhoun et al. eds., 2011).

247. Wendy Brown, *The Sacred, the Secular, and the Profane: Charles Taylor and Karl Marx*, in *VARIETIES OF SECULARISM IN A SECULAR AGE* 83, 84 (Michael Warner et al. eds., 2010).

unable to demonstrate its own presupposition that the passage from the Middle Ages to modernity was somehow inevitable, necessary, and normative.²⁴⁸

Although modern elites from before and after the French Revolution²⁴⁹—and apparently the world over²⁵⁰—insist on the perfectibility of man, nature, and society,²⁵¹ this progressive progression is spurred by the direct repudiation of the faith of the ancients and the affirmation of modern secular belief in human ability and power.²⁵² Furthermore, though this insistence on secularist thought—as a form of faith can be recognized as a “belief in amelioration without limit, of mutability without *telos*, of progress without boundary, and of faith without grounding . . .”²⁵³—it remains doubtful that society can endure without a transcendent horizon.²⁵⁴ This contention aptly applies to moderns, despite the fact that they emphasize the self-construction of identity,²⁵⁵ because it is equally true that there is an “unslaked craving for transcendence” that percolates within the Latin West.²⁵⁶ Third, in order for modern rationality and reason to become a normative guide or an interpretative principle, it must be sustained collectively and communally because it likely requires agreement on foundations and principles.²⁵⁷ Given the current absence of such an agreement,

248. Adrian Pabst, *Secular Supercessionism and Alternative Modernity*, THE IMMANENT FRAME (Sep. 24, 2013, 12:26 PM), <http://blogs.ssrc.org/tif/2013/09/24/secular-supercessionism-and-alternative-modernity/> [<https://perma.cc/YNQ9-UAVU>].

249. PATRICK J. DENEEN, *DEMOCRATIC FAITH* xiii–xiv (2005) (describing the decision of the French Assembly, after the success of the French Revolution, to desecralize the Cathedral of Saint Genevieve and rededicate the basilica as the Panthéon, the final resting place for France’s revolutionary heroes, and the subsequent decision to remove the coffin of Jean-Jacques Rousseau to the Panthéon completing the process of converting a Christian church into a secular cathedral and thus declaring the city’s preeminence over God).

250. *Id.* at xv (discussing Chinese students who assembled a styrofoam sculpture called the Goddess of Democracy in Tiananmen Square, the apparent desecralized descendant of the Cathedral of St. Genevieve in France).

251. *Id.* at 4.

252. *Id.* at xiv.

253. *Id.* at 5.

254. Brague, *supra* note 201, at 1–10.

255. BRAD S. GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* 292 (2012).

256. *Id.* at 10 (quoting ANDREW DELBANCO, *THE REAL AMERICAN DREAM: A MEDITATION ON HOPE* 112 (1999)).

257. Harry G. Hutchison, *Affirmative Action: Between the Oikos and the Cosmos* Review Essay: Richard Sander & Stuart Taylor, Jr., *Mismatch: How Affirmative Ac-*

coherence may be at risk. Philosopher Alasdair MacIntyre demonstrates the difficulty—if not the impossibility—of solving moral disputes on the basis of reason alone by adroitly showing that the “key episodes in the history of philosophy were what fragmented and largely transformed morality.”²⁵⁸ Evidently, fragmentation sparked Immanuel Kant and John Stuart Mill’s “attempt to develop accounts of morality in the name of some impersonal standard,” which was an “understandable response to the loss of shared practices necessary for the discovery of goods in common.”²⁵⁹ Kant and Mill’s project is “doomed to failure, however, exactly because no such standards can be sustained when they are abstracted from the practices and descriptions that render our lives intelligible.”²⁶⁰ Beyond the failure of “neutral” impersonal standards to deliver anything close to narrative coherence, it is worth noting Jeremy Waldron’s instructive contention that liberalism in its prescriptive form is not politically neutral, and his corresponding allegation that secular political culture, purged of the sacred, inevitably dampens the nation’s informed concern for the marginalized and impoverishes the nation’s discourse on social justice.²⁶¹ These claims are richly underscored by this Article’s earlier analysis of both the Progressive Era and the New Deal.²⁶²

If all of this is true, then Strine’s contention that the United States has become a singularly secular nation is doubtful. This conclusion is only further supported by reexamining his dependence on *Cantwell* for his standard claim that within a “secular” (neutral?) polity, employer “[c]onduct remains subject to regulation for the protection of society.”²⁶³ This claim is destabilized, if not contradicted, by noting that *Cantwell* stands for three additional propositions, which, taken in combination,

tion Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It, 66 S.C. L. REV. 119, 122 (2014) [hereinafter Hutchison, *Affirmative Action: Between the Oikos and the Cosmos*].

258. Hauerwas, *supra* note 122, at 36.

259. *Id.*

260. *Id.*

261. Jeremy Waldron, *Secularism and the Limits of Community* 2 (N.Y.U. Pub. L. & Legal Theory Working Papers, Paper No. 247, 2010), available at http://lsr.nellco.org/nyu_plltwp/247 [<https://perma.cc/F6FW-MFDV>].

262. See *supra* Part II.

263. See, e.g., Strine, *supra* note 18, at 83 (accepting the notion that conduct remains subject to regulation for the protection of society and citing *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940)).

would serve to constrain the power of the state. First, the case implies a rule that whenever a state burdens the freedom of religion, the law at issue must be analyzed under strict scrutiny, which is required by the First Amendment as well as the general guarantees of due process and equal protection.²⁶⁴ Second, commencing with *Cantwell*, during the past fifty years the Supreme Court has held that the values protected by the religion clauses are fundamental aspects of liberty in our society and must be protected from both state and federal interference.²⁶⁵ Third, the *Cantwell* Court concurrently—contrary to the implications associated with Strine’s assertions—vindicated the liberty interest of members of the Jehovah’s Witnesses and invalidated the State of Connecticut’s attempt to censor religion.²⁶⁶ Moreover, although Strine routinely justifies qualms regarding employers’ religious objections and their pursuit of exemptions from generally applicable law, by invoking the history of the United States,²⁶⁷ he manages to do so without noting the linguistic parallels between *Buck v. Bell*²⁶⁸ and *Cantwell*²⁶⁹ or the different outcomes of the two cases on the question of individual liberty.²⁷⁰ Importantly, in *Cantwell*, the Court invalidated

264. NOWAK & ROTUNDA, *supra* note 80, at 1195.

265. *Id.* at 1549.

266. *Cantwell*, 310 U.S. at 305 (finding that the state’s “censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth”).

267. *See, e.g.*, Strine, *supra* note 18, at 77–85.

268. 274 U.S. 200, 207 (1927) (upholding the involuntary sterilization of Carrie Buck and noting that the Constitution could not prevent the State of Virginia from concluding that “[t]hree generations of imbeciles are enough”). Of course it is highly unlikely that Carrie Buck was an “imbecile.” *See* Hutchison, *Waging War on the “Unfit”?*, *supra* note 155, at 20 (citing LOMBARDO, *supra* note 161, at 158).

269. Linguistic parallels arise because both cases contain language suggesting the state takes precedence over the individual liberty interest of the claimants. *See, e.g.*, *Cantwell*, 310 U.S. at 304 (stating that “[c]onduct remains subject to regulation for the protection of society”); *Buck*, 274 U.S. at 207 (stating “that the public welfare may call upon the best citizens for their lives”).

270. Although the *Cantwell* Court did not provide a special exemption for religious speakers, it did exempt both religious and nonreligious speakers from certain types of licensing systems that would have been validly applied to business that did not involve First Amendment activity, thus valorizing the liberty interest of the religious speaker. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 80, at 1625. On the other hand, the *Buck* Court rejected Carrie Buck’s equal protection and due process challenges to a state sterilization decision, thus allowing the state to move forward in vitiating her liberty interest. *Buck*, 274 U.S. at 207.

the state licensing solicitation statute as applied to the plaintiffs because it deprived them of liberty without due process of law.²⁷¹ This holding, properly understood, limits the force of this decision as a forward-looking basis on which to construct the limitless expansion in social-progress legislation that Strine apparently craves. This further suggests that Strine's reliance on *Cantwell* for the proposition that employer conduct necessarily remains subject to regulation for the protection of "secular" society is overstated and that his justifications for social-progress legislation are tenuous. This remains the case even if Charles Taylor is right that, culturally speaking, the Latin West has capitulated to the currents that instantiated a secular age,²⁷² as part of a move that may foster support for flattening religious liberty in the future.²⁷³

Lastly, Strine's claim that the nation ought to be properly seen as a "secular society" fails to deal with the fact that the term is tautological because the ideal of secularity is latent with the modern use of the term "society."²⁷⁴ As Professor Brague shows, the use of the term "secularism" in English began in the middle of the nineteenth century,²⁷⁵ well after the founding of the Republic. Secularism, agnosticism, and humanism represent the efforts of philosophers within the Latin West to evoke the possibility of a nonreligious basis for a morally animated society.²⁷⁶ A thorough understanding of history shows that the root of *secular*, *secularism*, and *secularity* cannot escape their religious and even biblical origins,²⁷⁷ notwithstanding Strine's use of such words to traffic the view that, in our democratic social space, we are all boxed in and ontologically separated from external sources of authority implied by religious sensibilities.²⁷⁸ Representing the modern surrender to secular neutrality,²⁷⁹ Strine's views, if accepted, signify that whoever declines

271. See *Cantwell*, 310 U.S. at 303.

272. See, e.g., JAMES SMITH, *supra* note 199, at 92–93.

273. Hutchison, *Metaphysical Univocity*, *supra* note 124, at 111.

274. Brague, *supra* note 201, at 1.

275. *Id.* at 1–2.

276. *Id.* at 2.

277. *Id.*

278. See *id.* at 7.

279. STEVEN SMITH, *supra* note 10, at 136–38 (exposing the Latin West's progression as evolving from strategies of coercively maintained religious orthodoxies to policies of religious toleration and thence to the dominant modern position of

to take a seat at the nation's table on the same level as all other claims and authorities, is barred from the game.²⁸⁰ Evidently, rather than accept a less pretentious American settlement regarding religious accommodation, with its central tenet neither neutrality nor secularism but rather open contestation with a framework committed to church-state separation and freedom of conscience, commentators like Strine appear to be dedicated to what Steven Smith calls a pretense, one that is premised on the imagined neutrality of secular neutrality,²⁸¹ despite the hopelessness of attaining this goal through reason.²⁸² Although this implicitly, if not explicitly, normative approach may appeal to elites as they endeavor to marshal public opinion behind an escutcheon that signals official government neutrality among competing moral and religious positions,²⁸³ and as a banner that surfaces as part of a process that seeks to advance the adoption of secular neutrality as the prevailing orthodoxy,²⁸⁴ this effort may signify the nation's drift toward cultural, political, and finally adjudicatory incoherence.²⁸⁵ Incoherence is deftly unmasked first by Winnifred Fallers Sullivan's intuition that one cannot celebrate religious freedom while denying it to those whose religion one dislikes²⁸⁶ and second by N.T. Wright's commanding claim that "there is no neutral ground, no island in the middle of the epistemological ocean as yet uncolonized by any of the warring continents."²⁸⁷

Nonetheless, it seems that Strine—like many elites in hot pursuit of democratic perfection—rejects religious sensibilities in favor of a strong insistence upon secularized forms of faith within the political domain, while overlooking the fact that the

secular neutrality premised on the view that the latter phase is more enlightened and inclusive).

280. Brague, *supra* note 201, at 7.

281. See STEVEN SMITH, *supra* note 10, at 138.

282. Hutchison, *Metaphysical Univocity*, *supra* note 124, at 105.

283. See, e.g., STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 75 (1995) (contesting the possibility of establishing a "neutral theory").

284. See STEVEN SMITH, *supra* note 10, at 136–38.

285. Hutchison, *Metaphysical Univocity*, *supra* note 124, at 107.

286. Winnifred Fallers Sullivan, *The impossibility of religious freedom*, THE IMMANENT FRAME (July 8, 2014, 12:33 PM), <http://blogs.ssrc.org/tif/2014/07/08/impossibility-of-religious-freedom/> [<https://perma.cc/B3KB-NEGE>].

287. NICOLAS T. WRIGHT, SURPRISED BY HOPE: RETHINKING HEAVEN, THE RESURRECTION, AND THE MISSION OF THE CHURCH 64 (2008).

propagation of democratic faith in social progress may obfuscate the religious lineage of such beliefs.²⁸⁸ Strine's determinate approach is calibrated to appropriate seats at the democratic table for his own use by suggesting that individuals and groups, who fail to share his view of the Republic, ought to be excluded from the public square. To the extent that the Supreme Court accepts this position, it is possible that traditional religion will be seen as a constitutional scandal: an offense against the whole ethos of contemporary liberal neutral egalitarianism,²⁸⁹ making compromise difficult²⁹⁰ as the political and legal culture led by Chief Justice Strine and others demands that the Court get off the fence and rule against religious sensibilities that can be found not only within the nation's founding documents, but also within a society that currently claims to be committed to diversity. While the Court may have already taken steps in this direction,²⁹¹ it is far from clear that we are there yet. To the extent that neither the Court nor the polity embrace fully Strine's normative claim that the Republic is a secular state, it undermines the force of his analysis as well as his thesis that social progress is arguably inevitable. Equally likely, this undermining process may serve to derogate his corporate law intuitions as well. This is the subject to which I now turn.

IV. CORPORATE LAW PRINCIPLES AND *HOBBY LOBBY*

To repeat, *Hobby Lobby* was prompted by litigation commenced by three for-profit corporations that were led and owned by devout Christians opposed to the inclusion of certain forms of contraception in their respective firms' health insurance policies.²⁹² The firms and their owners maintained that the contested contraceptives are abortifacients.²⁹³ In the name of the respective firms, the owners argued that the ACA's contraceptive mandate, as applied, violated RFRA by compelling them to "facilitate access" to the contested contraceptives in violation of

288. See DENEEN, *DEMOCRATIC FAITH*, *supra* note 249, at 96.

289. STEVEN SMITH, *supra* note 10, at 153.

290. *Id.* at 153–54.

291. *Id.* at 167–68.

292. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2765–66 (2014).

293. *Id.*

their religion.²⁹⁴ RFRA, as amended by RLUIPA, covers “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”²⁹⁵ RFRA reflects Congress’ determination to reverse *Employment Division v. Smith*,²⁹⁶ wherein the Supreme Court declined to apply the Court’s pre-existing balancing test established in *Sherbert v. Verner*.²⁹⁷ As the *Smith* Court noted, *Sherbert* held that “governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.”²⁹⁸ Provoked by the demise of *Sherbert*’s balancing test, Congress repudiated the *Smith* Court’s contention that “[a] holding to the contrary would create an extraordinary right to ignore generally applicable laws that are not supported by a ‘compelling governmental interest’ on the basis of religious belief.”²⁹⁹ Prompted by this development, the *Hobby Lobby* majority opinion held that “nothing in RFRA suggests a congressional intent to depart from the Dictionary Act definition” of “person,”³⁰⁰ which includes corporations as persons who may bring an action. Notwithstanding the Court’s conclusion, many commentators assert that for-profit corporations, by definition, lack standing to bring a free exercise claim within either a constitutional or RFRA framework.³⁰¹ Bringing a similar viewpoint to the table, Strine nonetheless concedes that the *Hobby Lobby* Court held that for-profit corporations could make the same claims under RFRA as could a natural person or “a non-profit corporation dedicated explicitly to a religious purpose, like a church, thereby ‘protect[ing] the religious liberty of the humans who own and control those

294. *Id.* at 2755.

295. See 42 U.S.C. § 2000cc-5(7)(A) (2012).

296. 494 U.S. 872 (1990).

297. 374 U.S. 398, 410 (1963) (holding that South Carolina could not deny unemployment benefits to a claimant who was fired for refusing to work on Saturday because of her religious beliefs).

298. *Smith*, 494 U.S. at 883.

299. *Id.* at 873.

300. *Hobby Lobby*, 134 S. Ct. at 2768.

301. See, e.g., Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners at 10–16, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356) [hereinafter Law Professors’ Brief] (emphasizing separation between a corporation and its shareholders, as a principle that deprives shareholders of the ability to act on behalf of the corporation and, which likewise extirpates the right of a corporation to sue to assert rights of its shareholders).

companies.”³⁰² Prescinding from directly disputing the Court’s understanding of religious liberty, Strine asserts that he would “sketch out some thoughts on the tension in the Court’s reasoning related to corporate law.”³⁰³ My reading of Strine’s analysis suggests that it is doubtful that he is content with this self-limiting proposition.³⁰⁴

Indeed, repelled by the *Hobby Lobby* Court’s approach, Strine adopts Justice Ginsburg’s claim in dissent that “[e]ssentially, the majority determined that a corporation’s religious objection to providing its employees with the minimum benefits guaranteed under the law can override any rights of the employee, so long as ‘the government . . . can pick up the tab.’”³⁰⁵ Strine argues that allowing corporations to exercise their religious liberty interests deprives deserving workers of a “right” to minimum essential coverage.³⁰⁶ Once Congress grants positive benefits to workers, so the argument goes, the fundamental liberties held by employers, which are protected by either the Constitution or by statute, must give way to the demands of progress, because to do otherwise signifies that employees will lose benefits arising out a process that the state itself has created.³⁰⁷ Strine’s reasoning implies two possibilities: either for-profit corporations cannot be the recipient of fundamental liberties within the context of a majoritarian democracy or, alternatively, corporate liberties must, in every case, give way to employee interest despite ample adjudicative evidence showing that the for-profit status of a firm—

302. See Strine, *supra* note 18, at 93 (quoting *Hobby Lobby*, 134 S. Ct. at 2768).

303. See *id.*

304. See *id.* at 93–95. Instead, implicitly, if not explicitly, he critiques the Court’s reasoning by: (1) emphasizing the failure of the Court to engage in any inquiry as to whether there was any real burden imposed on the plaintiffs by the ACA; (2) wondering why the Court was unwilling to quibble with a plaintiff’s assertion that the contraceptives at issue were abortifacients; (3) criticizing the Court’s reliance on the Obama Administration’s affirmative grant of exemptions because it undermines the government’s compelling interest claim; (4) rejecting the Court’s contention that the mandate was not the least restrictive method of furthering the government’s compelling interest as required by RFRA; and (5) attacking the Court’s contention that a “mandate was not the least restrictive methods of providing access to contraception” because the most straightforward way of doing so would be for the government to assume the costs of providing the four disputed contraceptives. See *id.*

305. See *id.* at 95 (quoting *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting)).

306. See *id.*

307. See *id.*

corporate or otherwise—does not stand as a barrier to the exercise of religious liberty.³⁰⁸

Strine furthers his corporate law critique by underlining Berle and Means's separation of ownership and control formulation,³⁰⁹ which unexceptionally applies to large publicly-traded firms. Explicating the separation of ownership and control framework, a viewpoint that resonates with a number of law professors who signed onto a *Hobby Lobby* amicus brief opposing the plaintiffs' claims,³¹⁰ Strine submits the following allegation:

The essence of a corporation is its "separateness" from its shareholders. It is a distinct legal entity, with its own rights and obligations, different from rights and obligations of its shareholders When they voluntarily choose to incorporate a business, shareholders cannot then decide to ignore, either directly or indirectly, the distinct legal existence of the corporation when it serves their personal interests.³¹¹

Erected on this foundation, Strine contends the employers at issue in *Hobby Lobby* remain distinct legal entities from their owners and their owners' beliefs, which disqualifies the firms themselves from taking advantage of RFRA protection.³¹² He further supports such claims by noting that legal separation of ownership and control within the context of for-profit corporations provides huge benefits to both the firm and the owners of the equity.³¹³ Hence, despite evidence showing that "the body of the [Supreme] Court's corporate-rights jurisprudence, taken as a whole, can be understood to reflect to a surprising degree the contractarian premises of transaction-and-agency-cost eco-

308. See, e.g., Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 61–62 (2013).

309. For a discussion of Berle & Means's insights, see Hutchison, *Religious Liberty for Employers as Corporations*, *supra* note 19, at 16–17 (stressing their focus on large publicly traded firms and their failure to fully incorporate contractarian insights).

310. See Law Professors' Brief, *supra* note 301, at 2–4, 13–14. See also Bainbridge, *Nexus of Contracts*, *supra* note 1, at 3–4 (suggesting that corporate law carves separation of ownership and control into stone as a matter of basic doctrine).

311. Strine, *supra* note 18, at 109–10 (quoting Law Professors' Brief, *supra* note 301, at 2).

312. See *id.* at 109.

313. See *id.*

nomics,”³¹⁴ a viewpoint that provides many corporate law scholars with a basis to dispute the importance of “separation of ownership and control” as a defining attribute,³¹⁵ and in spite of scholarship that shows that rather than elevating legal “separateness” as a dispositive attribute, the Court, consistent with the range of choices available to an entrepreneur, ascribes corporate rights such that entrepreneurs are neither rewarded nor punished for selecting the corporate form over other modes of social coordination such as partnerships, proprietorships, LLCs or nonprofit firms.³¹⁶ Finally, despite Justice Brennan’s observation that, “[b]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis,”³¹⁷ Strine persistently argues that corporate separateness is an intractable barrier to the exercise of religion by for-profit corporations.

But even if Strine’s understanding of the Court’s corporate law jurisprudence is superior to Justice Brennan’s conclusion and those advanced by leading corporate scholars,³¹⁸ and even if Strine’s corporate separateness trope remains vibrant regarding the typical aspects of corporate law, the question becomes: Does that preclude corporations from acting in a manner different from what Strine or others might expect in a given case? This question requires an answer before fully accepting Strine’s contention that, although:

the Court gave heavy weight to the fact that the company’s equity was wholly owned by the Green family [referencing one of the *Hobby Lobby* plaintiff-corporations], and that the family had shared religious beliefs[, i]t ignored any potential tension between the interests of the corporation—which the Court noted was a separate “person” . . . and the interests of the individual stockholders.³¹⁹

Strine’s obdurate focus on the presumed tension arising out of the separation of ownership and control framework has a van-

314. Vincent S. J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 504 (2016).

315. *Id.* at 505.

316. *Id.* at 502–03.

317. *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 687 (1978).

318. See, e.g., Buccola, *supra* note 314, at 499–541; Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273, 273–301 (2014).

319. Strine, *supra* note 18, at 108.

ishingly small chance of being crucial and high probability of being misdirected for several reasons. First, as Henry Manne has shown in his seminal article discussing the market for corporate control, Berle and Means's paradigmatic focus on the separation of ownership and control issue is inapt when observers are able to discern a close relationship between shareholders and management,³²⁰ a reality that corresponds with the actual facts on the ground regarding the respective firms in *Hobby Lobby*.³²¹ Second, as corporate law scholars Meese and Oman show: within the nexus-of-contract framework, the structure of governance is contingent and contractual, enabling shareholders to unify ownership and control and thus exercise the same prerogatives as owners of non-corporate businesses, all while maintaining limited liability and without adhering strictly to separation of ownership and control.³²² As a result of this custom-tailored process, shareholders regularly impose their religion on corporations.³²³ In practice: (1) "[f]or-profit corporations infused with their owners' religion are common"; (2) "[t]hese businesses do no violence to corporate law, which is primarily contractual and facilitative"; (3) "[t]here is no evidence that these firms generate greater corporate dysfunction than their secular counterparts"; and (4) despite the fact that "society treats corporations as legally distinct for some purposes . . . this is simply a pragmatic choice rather than a normative judgment that human concerns do not apply to such firms."³²⁴ Third, "[t]here is no single model of corporate governance," and as such, there is often no "fundamental distinction between closely held corporations . . . and the partnerships or sole proprietorships they mimic."³²⁵ This convincing understanding of corporate law and theory corresponds with the reality that the corporate form can be essentially identical in practice to a wide variety of other for-profit vehicles enabling

320. See Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112, 116–17 (1965) (indicating that only so long as we are unable to discern any control relationship between shareholders and management does Berle and Means's separation of ownership and control framework apply).

321. For a description of the each of the respective *Hobby Lobby* firms, shareholders, shareholders groups, and customized operational structure, see Hutchison, *Religious Liberty for Employers as Corporations*, *supra* note 19, at 42–44.

322. See Meese & Oman, *supra* note 318, at 277–79.

323. *Id.* at 279–80.

324. *Id.* at 300.

325. *Id.* at 287.

entrepreneurs to exercise personalized choice with regard to the business form that is most suitable to their needs, wants, and objectives. Thus appreciated, a variety of entities—including closely held corporations—can be operationalized within a default-rule paradigm that elevates the value of customization and human choice, while retaining statutory and constitutional rights that natural persons possess.³²⁶

In harmony with such claims, IRS rules and regulations commonly treat many corporations as entities that are indistinguishable from sole proprietorships for tax purposes.³²⁷ “Most for-profit corporations file their tax returns as ‘S corporations.’ [These corporations] ‘elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes,’ . . . [just] like partners in a partnership,”³²⁸ as the federal government declines to separate individual corporate owners of such firms from their businesses.³²⁹ Congruent with this move, Meese and Oman confirm that even limited liability, a typical attribute of a corporation, cannot serve as basis to deprive such entities of religious-liberty rights admittedly possessed by nonprofit corporations (which equally benefit from limited liability), partnerships, or sole proprietorships.³³⁰ Hence, they justifiably insist that no “essence of corporateness” bars shareholders with religious sensibilities and prerogatives “from employing for-profit corporations to exercise their religion.”³³¹ Reliably, with this opinion, neither Justice Breyer nor Justice Kagan—who dissented in the *Hobby Lobby* case on the merits—agreed with either Justice Ginsburg’s or Chief Justice Strine’s perspective that corporate status, standing alone, renders such firms ineligible to bring free exercise claims under RFRA.³³²

But of course there is more to Strine’s critique of the *Hobby Lobby* decision. Strine notes that the *Hobby Lobby* majority at-

326. Hutchison, *Religious Liberty for Employers as Corporations*, *supra* note 19, at 40.

327. Rienzi, *supra* note 308, at 97–98.

328. *Id.* at 97 (quoting *S Corporations*, IRS.GOV, <https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/S-Corporations> [https://perma.cc/C4ZP-FQKX] (last updated Mar. 28, 2016)).

329. *Id.*

330. See Meese & Oman, *supra* note 318, at 286–87.

331. *Id.* at 274.

332. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2806 (2014) (Breyer, J., and Kagan, J., dissenting).

tempted to limit its holding to closely held firms,³³³ but he implicitly argues against the importance of such a claim by stating that such firms “are not a small segment of the workforce.”³³⁴ Returning to his parade of horrors, he proclaims that the ACA’s exemption framework has now been broadened by the Court into a much larger potential threat to the law, specifically to the minimum essential coverage guaranteed to each worker by the Act.³³⁵ Moreover, he argues that the *Hobby Lobby* Court snubbed the possibility that its holding and its correlative “least restrictive framework” for purposes of furthering the government’s compelling interest³³⁶ would inevitably lead to a flood of religious objections to other procedures. If so, there is no logical stopping point, which precludes employers from successfully demanding that the government pay for coverage or services, if and when a firm proffers religious objections to otherwise enforceable government mandates.³³⁷ On this account, *Hobby Lobby* is the opening salvo in a corporate effort that is poised to reach a pounding crescendo that will rupture the foundations of the social safety net, thus drowning out employee rights in a wide variety of cases.³³⁸ If so, *Hobby Lobby* should be seen as the definitive case that implies a future constriction in employee rights—one that facilitates the return of corporate paternalism and thereby threatens freedom guaranteed to workers by laws enacted over the past century.³³⁹ Evidently, this corporate menace has become ever more ominous in the face of a number of disquieting circumstances.³⁴⁰

After largely exhausting the contention that the *Hobby Lobby* case prepares the nation for a volcanic eruption of corporate

333. See Strine, *supra* note 18, at 97.

334. See *id.*

335. See *id.*

336. See *Hobby Lobby*, 134 S. Ct. at 2779 (citing 42 U.S.C. § 2000bb–1(b) (2012)).

337. Strine, *supra* note 18, at 97.

338. *Id.* at 98–100.

339. *Id.* at 100.

340. *Id.* at 100–04 (listing the following circumstances: (1) the fact that unions (putatively formed to protect workers) are in decline, (2) the present reality that good jobs are scarce, (3) the fear that women are placed under threat because intrauterine devices (IUDs) as a form of contraception are expensive, (4) the number of firms that engage in self-described “corporate religion” is large, and (5) the fact that *Hobby Lobby* prompts further efforts by employers to lower costs by impinging on workers’ freedom such as requiring workers “to undergo testing for tobacco use” or otherwise “suffer consequences for obesity”).

power while pressurizing corporate law itself, Strine contends that the *Hobby Lobby* majority “ignored another critical question: who can decide what the corporation’s religion is?”³⁴¹ As an initial matter, this contention is surprising, particularly if one holds the position that a corporation is managed under the direction of the directors—a perspective that finds support in Delaware’s General Corporation Law.³⁴² More broadly, “modern corporate law provides shareholders of closely held corporations with numerous tools for structuring the firm to mirror the allocation of responsibilities in other forms of business enterprises, including partnerships.”³⁴³ An appropriate understanding of Delaware law clearly shows that these “devices obliterate any boundary between ownership and control,”³⁴⁴ enabling firms mirroring the organizational structure of the respective *Hobby Lobby* entities to operate as “incorporated partnership[s].”³⁴⁵ Corporate law scholars Meese and Oman verify that “Delaware expressly empowers shareholders to employ these devices to ‘treat the corporation as if it were a partnership or to arrange relations among the stockholders or between the stockholders and the corporation in a manner that would be appropriate only among partners.’”³⁴⁶ “No fiduciary duties or other manifestations of corporate separateness constrain such shareholders from exercising the very same ownership prerogatives as members of a partnership.”³⁴⁷ As such, “there is simply no distinction relevant to the exercise of religion between the nexus of contracts known as the partnership and that known as a closely held corporation.”³⁴⁸ Shareholders of “such ‘incorporated partnerships,’” who effectively act as the employers of record, “would still retain limited liability, unlike partners, and the firms themselves would continue to enjoy entity status for transactional or other purposes, unlike

341. *Id.* at 110.

342. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2014) (stating that “[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation”).

343. Meese & Oman, *supra* note 318, at 285.

344. *Id.*

345. *Id.* at 281.

346. *Id.* at 285 (quoting DEL. CODE ANN. tit. 8, § 354 (2014)).

347. *Id.*

348. *Id.*

the partnership they otherwise mimic.”³⁴⁹ While Delaware law does not decide the *Hobby Lobby* case, it is plain that the state’s incorporation statute provides persuasive authority that signifies that directors and shareholders may pursue objectives that eschew categorical profit maximization and fortify religious values³⁵⁰—a move that may increase profits.³⁵¹

Second, Strine’s claim that the *Hobby Lobby* Court ignored the question of who decides the respective firm’s religion is puzzling on another level—a puzzle that Professor Buccola has already solved. Although opponents of the *Hobby Lobby* decision “have asked why the religious views of the shareholder-managers counted in the Court’s analysis but not the views of other patrons, such as employees,”³⁵² Professor Buccola offers a remarkably original organizational-neutrality scaffold for purposes of understanding the Supreme Court’s corporate law jurisprudence; he explains why employers’ views count.³⁵³ Buccola reveals that, despite its clumsy language,³⁵⁴ the *Hobby Lobby* Court was “simply trying to locate the persons whom, absent the corporate form, the [ACA] would have regarded as the ‘employers’ to be regulated.”³⁵⁵ “Although the majority opinion declared that recognizing a free-exercise claim in *Hobby Lobby* would protect the companies’ ‘owners and controllers,’ it does not logically follow that every corporate exercise of religion would protect the shareholder-managers directly.”³⁵⁶ Within the corporate structure of each of the respective firms making up the *Hobby Lobby* case, the controllers could be directors, shareholders, managers, or all of the above.³⁵⁷ That said, most salient for purposes of answering Strine’s question is the simple fact that

[t]he regulation at issue in *Hobby Lobby* [arising out of the ACA itself] was a regulation of *employers*—in particular em-

349. *Id.*

350. See Strine, *supra* note 18, at 110 n.274.

351. Meese & Oman, *supra* note 318, at 284.

352. Buccola, *supra* note 314, at 538.

353. *Id.*

354. *Id.* (showing that the Court inconsistently referred to “shareholders,” “owners,” and “owners and controllers” in attempting to find the persons to whom, absent the corporate form, the ACA mandate applied).

355. *Id.*

356. *Id.* (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014)).

357. Hutchison, *Religious Liberty for Employers as Corporations*, *supra* note 19, at 47.

ployers with 50 or more employees—and thus neutrally directed the Court to consider what rights such employers would have had in an analogous but unincorporated enterprise, for example in a proprietorship.³⁵⁸

Thus appreciated, the religious commitments of the *Hobby Lobby* firms' shareholder-managers were central to appropriately deciding the case *not* because they owned the capital contribution but because they were employers of record pursuant to a series of agreements³⁵⁹ arising out of the entrepreneurial-choice framework.³⁶⁰

Facilitated by entrepreneurial choice, corporations, conceptually and operationally, can run the gamut from hierarchical publicly traded firms to closely held entities that are more like partnerships, membership organizations, or associations of individuals.³⁶¹ Such a flexible understanding of for-profit corporations is congruent with the notion of human choice because it allows people to seek diverse ends in a diverse society. As such, it is likely that the Supreme Court's acceptance of the entrepreneurial-choice framework that grounds itself in law and economics scholarship—a framework which enables closely held firms to pursue their religious autonomy interests—strengthens rather than transforms corporate law. And such a view is consistent with the claim that “American law can be truly and adequately respectful of religious freedom only if the law offers avenues to accommodate deeply held, conscientious religious commitments.”³⁶² If all of this is true, these conclusions combine to dispute Strine's entrenched corporate law intuitions,³⁶³ which imply that corporate law and corporate separateness form an impassable barrier to a corporation's religious liberty ambitions. Hence, the *Hobby Lobby* case, rather than placing corporate law

358. Buccola, *supra* note 314, at 42.

359. For a description of such agreements, see Hutchison, *Religious Liberty for Employers as Corporations*, *supra* note 19, at 42–44.

360. *Id.* at 47.

361. See, e.g., Meese & Oman, *supra* note 318, at 278–94.

362. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 36 (2015).

363. See, e.g., Meese & Oman, *supra* note 318, at 280 (disputing the notion that the corporate “separateness” thesis is dispositive and hence contesting Strine's approach and showing that classical economics assumes that firms frequently unite ownership and control, thereby concentrating decision-making authority and economic consequences in the same hands).

under stress, strengthens and reaffirms existing contractarian insights that underscore the actual practice of corporate law in a society that values the entrepreneurial prerogatives of natural persons. In reality, it is much more likely that Justice Ginsburg's *Hobby Lobby* dissent, and Chief Justice Strine's analysis, would place corporate law under unwarranted pressure, a development that appears to be inconsistent with human choice.

V. UNSUSTAINABLE LIBERALISM IN THE MIRROR OF CONTRADICTION

In order to appreciate the contradictions entrenched in Chief Justice Strine's approach—a viewpoint that is explicitly dedicated to an expansion of the liberal regulatory state—it is advisable to briefly reconsider Professor Deneen's scholarship. Concentrating on the assumptions that surface in liberalism's problematic history, Deneen initially observes that liberalism is constituted by a pair of deep “anthropological assumptions that give liberal institutions a particular orientation and cast: (1) anthropological individualism and the voluntarist conception of choice, and (2) human separation from and opposition to nature.”³⁶⁴ Rightly appreciated, liberalism and its intellectual offspring—Progressivism, the New Deal, and the notion of limitless “social progress”—did not introduce the idea of choice but instead “dismissed the idea that there are wrong or bad choices, and thereby rejected the accompanying social structures and [mediating] institutions that were ordered to restrain the temptation toward self-centered calculation.”³⁶⁵ Although contemporary society has discovered that its ability to carry on rational discussion of moral issues has vanished and, as such, substitutes emotivism for narrative coherence and reason,³⁶⁶ it is valuable to note, in grounding politics upon the idea of the free, unfettered, and autonomous choice of individuals, that liberalism conferred legitimacy via the notion of consent.³⁶⁷ Thus, law can be seen by liberalism's most robust defenders as a legitimate restraint upon the external actions of individuals

364. See Deneen, *Unsustainable Liberalism*, *supra* note 8, at 26.

365. *Id.*

366. Hutchison, *Metaphysical Univocity*, *supra* note 124, at 103–04 (discussing Alasdair MacIntyre).

367. Deneen, *Unsustainable Liberalism*, *supra* note 8, at 26–27.

(employers), one that restricts the autonomous, yet potentially destructive, activity of radically separate and rivalrous human beings who are monitored increasingly by the state.³⁶⁸ Law was and is seen as necessary to restrain self-interested individuals because there is no assumption of, or universal basis for, the existence of self-restraint born of mutual concern, and accordingly, issuing forth from within this richly Hobbesian and arguably dystopian process is the proposition that all legitimate authority ought to be vested in the state.³⁶⁹

This ever-ramifying process conceivably coheres with Strine's reasoning, while reifying his apparent intuition that the state, as the source of all legitimate authority, is the sole creator and enforcer of positive law and positive rights, and it even determines legitimate and illegitimate expressions of religious belief.³⁷⁰ This conclusion recommends itself, notwithstanding the fact that some versions of liberalism, or more precisely, some preliberal viewpoints, proffer an equally articulated concern for individual autonomy, human dignity, and limits upon central power and equality under the law.³⁷¹ Plainly, these attributes might lead in another direction. Grounded in the logic of such conflicting views, the state is charged with the maintenance of social stability and with preventing a return to natural anarchy; in discharging these duties, so the story goes, it "secures" our natural rights.³⁷² Erected on this descriptive framework, human beings are viewed as by nature "non-relational" creatures, separate and autonomous, a claim that is consistent with the deduction that liberalism is increasingly subject to the criterion of choice.³⁷³ That is, liberalism, expansively conceived, asks whether a given relationship has been chosen upon the basis of its service to rational self-interest.³⁷⁴ Originating from this philosophic plinth, all institutions, affiliations, and memberships and even personal relationships are subject to an emotive calculus premised on individual self-interest.³⁷⁵ Against

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

this descriptive frame, Patrick Deneen establishes that liberalism began with the explicit assertion that it merely and neutrally describes our political, social, and private decision-making.³⁷⁶ “Yet implicitly it was constituted as a constructive or normative project.”³⁷⁷ Although liberalism and the unrestrained liberal project present themselves as a benevolent description of human voluntarism, in reality this viewpoint had to “displace a very different form of human self-understanding and long-standing experience”³⁷⁸ that formerly supplied society with narrative coherence. Deprived of a previously ascendant normative foundation and coupled with the inability to converge on any framework to take the place of the Aristotelian moral tradition embedded in the medieval age,³⁷⁹ liberal theory “sought to educate people to think differently about themselves and their relationships.”³⁸⁰ Risking repetition, while liberalism often claims neutrality about the choices people make, it has, nonetheless, managed to become the defender of “Rights,” but not of any particular conception of the “Good,”³⁸¹ an outcome that is further complicated because modern man is waiting but does not know what he is waiting for.³⁸²

Hence, liberalism today is largely about the basis on which people make decisions as utility-maximizing individual actors wherein political and economic relationships are fungible and subject to constant redefinition, a progression that devalues all relationships including to place, to neighborhood, to nation, to family, and to religion.³⁸³ This revolutionary move has consequences: (1) it has left citizens radically alone by shrinking the force and influence of mediating institutions such as family, community, and churches, and (2) either causally or correla-

376. *Id.*

377. *Id.* at 27.

378. *Id.*

379. GREGORY, *supra* note 255, at 11 (referencing Alasdair MacIntyre and noting that the implosion of normative foundations in contemporary society is compounded because contemporary commentators, by and large, have proved unable or unwilling to settle or even begin to converge on any framework to take the place of the previously ascendant Aristotelian moral tradition embedded in the medieval age).

380. Deneen, *Unsustainable Liberalism*, *supra* note 8, at 27.

381. *Id.*

382. See CHANTAL DELSOL, *ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD* xxvii (Robin Dick trans., 2003).

383. Deneen, *Unsustainable Liberalism*, *supra* note 8, at 29–30.

tively, it has led to an expansion in state power as social-progress reformers sought, and continue to seek, to expand the size and scope of government programs by coupling a “dangerous faith in the benevolence of the state and its agents” with “blithe self-confidence in [their] own capacity to design effective” programs.³⁸⁴ This revolution in relationships—the move toward fungibility erected as the zenith of human flourishing disconnected from Aristotelian teleology—likely correlates with both the growth in the size of the state and the construction of an imaginative world that leaps ahead of reason.³⁸⁵

Equally plain, it corresponds with a second move. “The second revolution, and the second anthropological assumption that constitutes liberalism, is less visibly political,”³⁸⁶ while advancing an economic system—market-based free enterprise—that is similarly rooted in the expansion of human use, conquest, and mastery of the natural world.³⁸⁷ And yet, the consumerist market model of culture, predicated “on a widely embraced Romantic and Post-Romantic conception of the individual,”³⁸⁸ and premised on conquest and mastery, is not, in fact, a free market at all, for human desire is rooted in a normative framework; the structures of human desires are framed and shaped by historical and sociological forces exogenous to the market, even if it is equally true that things created are not culturally, morally, or religiously neutral.³⁸⁹ As Brad Gregory shows, within the context of the Latin West, the market eventually “displace[d] confessional churches as the junior partner alongside states in the public exercise of power”³⁹⁰ and today the terms of this partnership have been dramatically reversed, placing markets in the senior position in response to thoroughly globalized markets that are super-charged with credit default swaps and the like.³⁹¹ Consistent with these con-

384. Andrew Scull, *Progressive Dreams, Progressive Nightmares: Social Control in 20th Century America*, 33 STAN. L. REV. 567, 577 (1981) (reviewing DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980)).

385. Hutchison, *Metaphysical Univocity*, *supra* note 124, at 111–12.

386. Deneen, *Unsustainable Liberalism*, *supra* note 8, at 27.

387. *Id.*

388. GREGORY, *supra* note 255, at 292 (referencing Alastair MacIntyre).

389. HUNTER, *TO CHANGE THE WORLD*, *supra* note 105, at 30.

390. GREGORY, *supra* note 255, at 283.

391. *Id.* at 283–84.

tentions, Justice Ginsburg's *Hobby Lobby* dissent emphasizes the connection between the ability of women to control their reproductive lives and their ability to participate equally in the economic and social life of the Nation,³⁹² while the Obama administration calculates that ISIS-inspired savagery can be thwarted by providing young Muslim men with expanded employment options.³⁹³

Congruent with such observations, while market actors (firms) exist in large part to make money, they are free to advance political and social causes whenever it helps them do so; this provides reasons why large corporations influenced by members of America's "Power Elite" are likely to rebuff the *Hobby Lobby* decision and its religious liberty inclinations.³⁹⁴ This move lays bare Strine's paradoxical concern for contemporary corporate paternalism, which is illustrated by his opposition to the conduct of a number of relatively small, religiously motivated employers. Contrary to the presumptions which animate Stine's stance, Patrick Deneen adroitly shows that today's cultural "Power Elite" frequently joins forces with large global corporations ("Big Business") to effect changes preferred, or alternatively embraced, by such entities that too often damage the working class, while providing economic, social, and market benefits to those who already have disproportionate influence in society.³⁹⁵ In essence, consistent with John Gray's deductions, liberalism has become manifestly post-liberal,³⁹⁶ as "Big Business" and "Big Labor," adeptly assisted by "Big Lobbyist," join forces with "Big Government" to further entrench the "Power Elite," in a move that fashions "Statist paternalism." This creation, Statist paternalism (authoritarianism) that is ready to steamroll opposition,³⁹⁷ richly fortified by

392. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2788 (2014) (Ginsburg, J., dissenting).

393. R.R. Reno, *While We're at It*, *FIRST THINGS* 65, 65 (Apr. 2015).

394. See, e.g., Deneen, *The Power Elite*, *supra* note 218, at 2–4 (discussing how today's corporate ideology offered by power elites has a strong affinity with the "liberal" lifestyle defined by "mobility, ethical flexibility, liberalism (whether economic or social), a consumerist mentality in which [unrestrained] choice is paramount, and a 'progressive' outlook").

395. *Id.*

396. See generally, GRAY, *POST-LIBERALISM*, *supra* note 150, at 10–12.

397. Deneen, *The Power Elite*, *supra* note 218, at 3.

an unaccountable bureaucracy,³⁹⁸ corresponds with the above-referenced rejection of the *Hobby Lobby* firms' opposition to the contraceptive mandate. To the extent that the mandate advances self-centered calculations with regard to choice, it operates in tandem with large segments of society that have already capitulated to limitless choice in virtually all avenues of life. Thus, the behavior of cultural and economic power elites cannot be seen as conducive to the nation's first freedom, religious liberty. Equally true, this process seems toxic to ordered liberty.

Whereas premodern thought "understood the human creature to be part of a comprehensive natural order" informed by Aristotelian ideas that conceived of Man as having a telos³⁹⁹—a fixed end given by nature—liberal philosophy is largely constructed on its second anthropological assumption (human separation and opposition to nature). This assumption has undergirded the nation's surrender to Progressivism and the deployment of scientism that gave us *Buck v. Bell*, the New Deal with its focus on the gap between wants and needs, and the New Frontier promising new avenues of human and social improvement, moves that correspond with the rejection of the notion of human self-limitation or limits provided by nature. On this immodest view, who we are and which identity we choose is subject to constant redefinition, experimentation, and unrestrained choice in a world where the authority of social norms dissipates premised on the position that they are increasingly perceived as residual, arbitrary, and oppressive.⁴⁰⁰ This progression in sentiments, tied increasingly to a "'self' that constructs itself as it pleases in the self-chosen relationships it makes and breaks by exercising its right to do so through the desire for and acquisition of material things and their contribution to its self-construction,"⁴⁰¹ boosts individuation and, paradoxically enough, an enveloping sense of vulnerability that demands a collective remedy. Remediation takes the form of further government intervention in both the economy and the nation's civil and social affairs designed to shelter individuals

398. See, e.g., JAY SEKULOW, UNDEMOCRATIC: HOW UNELECTED, UNACCOUNTABLE BUREAUCRATS ARE STEALING YOUR LIBERTY AND FREEDOM 112 (2015) (explaining how unelected bureaucrats within the Justice Department helped to enact the ACA).

399. Deneen, *Unsustainable Liberalism*, *supra* note 8, at 27.

400. *Id.* at 31.

401. GREGORY, *supra* note 255, at 292.

who feel radically alone as they face the rampaging effects of both the global market and the cosmos.

If this analysis is correct, then the ACA's reification of the contraceptive mandate can be seen intuitively as part and parcel of the process of redefinition as children are viewed (or at least could be viewed) as either the attainment of a consumerist ideal or a limitation upon individual freedom,⁴⁰² whereas the state is perceived increasingly as a bulwark against individual vulnerability that appears to correlate with the growing appeal of a self-absorbed and self-constructed life.⁴⁰³ As a consequence of this combined process, the passage of positive law, such as the ACA, can now be cognized as part of an ideological and consumerist movement that enables employees to free themselves from previously accepted boundaries. This movement advances as science facilitates the achievement of self-fulfillment arising out of the attainment of workers' singular goals and objectives under a banner provided by legal innovation. Whereas associations and their correlative imprescriptible "rights" arising within the framework of organizations or corporations, formed by the respective families that created the respective *Hobby Lobby* firms, are seen, non-neutrally, as obstacles to autonomous liberty and liberalism's devotion to choice. This devotion may be enforced by the exercise of state power, despite the fact that the *Hobby Lobby* firms can trace the origin of their beliefs to a choice framework furnished by Locke, contractarianism, and the existence of enabling state corporate law.⁴⁰⁴ It should surprise no one that difficulties arise when the individual preferences of putative beneficiaries of the ACA insist that the state require other private individuals (employers) to finance their choice against the contrary self-definition of such employers who have fashioned corporations out of a family consensus that appeals to religious liberty thought to animate the Framers. Provoked by this smoldering clash tied to incommensurable values and rivalrous choices by actors asserting various versions of autonomy and invoking conflicting visions of liberty, it appears that Chief Justice Strine and Justice Ginsburg prefer to deploy the apparatus of the state in order to

402. Deneen, *Unsustainable Liberalism*, *supra* note 8, at 29.

403. GREGORY, *supra* note 255, at 286.

404. See, e.g., Meese & Oman, *supra* note 318, at 277–94 (discussing contractarianism and the existence of enabling legislation).

advance the task of liberating employees from any employer-sponsored bonds or boundaries arising out of the respective corporations' governance structure. This move establishes both the persistence of conflict and the likely existence of contradiction, if not incoherence, as the state inevitably must take sides, while simultaneously proclaiming its commitment to neutrality and human choice.

Building on this conclusion, one that elevates some forms of individual choice while simultaneously impinging on the choices of disfavored groups because they purportedly impose costs on third-party beneficiaries of the government's intrusion in the marketplace, this wrangle appears to represent an incipient tension between individualism and the collective. Tension arises because closely held firms seek to shield their normative choices by pursuing exemptions from generally applicable law within the meaning of the Religious Freedom Restoration Act. Resolving this dispute requires a return to an earlier theme: the deployment of an even larger coercive and collective force—the state—that may be the source of the problem in the first place. The resort to state power to resolve this tussle, for a number of reasons, signifies that Strine's expansive conception of liberalism appears to be unsustainable both economically and politically.

First, the collision between employers and employees pursuing autonomy may correlate with the forging of a society wherein human selfishness and solipsism⁴⁰⁵ have waxed, and self-control, community, and self-reliance have waned,⁴⁰⁶ thus nurturing a nation of narcissists who are incapable of controlling their own impulses and desires.⁴⁰⁷ As Ross Douthat shows, a nation of narcissists turns out to be one of Ponzi schemers, gamblers, and speculators—one wherein household debt rises alongside public debt as bankers, pensioners, automakers, and

405. Solipsism, or the view that "I alone exist," is apparently an epistemological position holding that knowledge of anything outside of one's own mind is unsure; this move leads to the conclusion that the external world and other minds cannot be known and might not exist outside of one's mind. See, e.g., J.P. MORELAND & WILLIAM LANE CRAIG, *PHILOSOPHICAL FOUNDATIONS FOR A CHRISTIAN WORLDVIEW* 388 (2003).

406. ROSS DOUTHAT, *BAD RELIGION: HOW WE BECAME A NATION OF HERETICS* 235 (2012).

407. *Id.* (providing a comprehensive demonstration that, in modern culture, the prevailing view is that only what we do here and now matters).

unions all compete to drain the public trough.⁴⁰⁸ This yields a rather immodestly adorned nation wherein boundless self-maximizing appetites spur unlimited government,⁴⁰⁹ an outcome that implies that both the government and its people are in grave need of additional clothing. Given that the rise in the size and scope of government⁴¹⁰ reflects the fact that the “state has permeated civil society to such an extent that the two are mostly indistinguishable,”⁴¹¹ the odds of escaping conflicts between religious groups and individuals on one hand and the state on the other are virtually nonexistent.⁴¹² And conflict arguably intensifies because government decisionmakers, just like corporate ones, suffer from bounded rationality.⁴¹³

Second, as the state grows in size and scope, the odds shift further in favor of the state and against religious institutions and individuals in areas of conflict. This consequence reflects the fact that individuals—liberated from membership in mediating groups—demand state-sponsored protection⁴¹⁴ from the uncertainty that arises from the vagaries of life in our increasingly interconnected world. This progression provokes renewed conflict between the state and mediating institutions like churches, church schools, hospitals, and even religion-based for-profit corporations. In reality, of course, the acclaimed conflict between individualism and the collective represents a false dichotomy because unmediated individualism

408. *Id.*

409. Hutchison, Lochner, *Liberty of Contract*, *supra* note 128, at 424.

410. See generally BRIAN M. RIEDL, HERITAGE SPECIAL REPORT: FEDERAL SPENDING BY THE NUMBERS 2010 (2010) (providing some perspective on the rise in government spending during the period from 1990 to 2010).

411. HUNTER, *TO CHANGE THE WORLD*, *supra* note 105, at 154.

412. Hutchison, *Metaphysical Univocity*, *supra* note 124, at 72.

413. See, e.g., Bainbridge, *Nexus of Contracts*, *supra* note 1, at 3 n.1.

414. Greg Sisk, *Harry Hutchison: Responding to “How Not to Do Social Justice”*, MIRROR OF JUSTICE (Nov. 6, 2013), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2013/11/harry-hutchison-responding-to-how-not-to-do-social-justice.html> [<https://perma.cc/E4LW-U38Y>] (describing Patrick Deneen’s analysis of Tocqueville and the individualist roots of Progressivism and linking the advance of individualism to classical liberalism and its supreme emphasis on the cultivation of the individual as persons who were liberated from membership in something larger and from embedded ties to mediating groups and how, accordingly, individuals sought shelter in the government, and arguing that unmediated individualism reinforces the state).

contributes to loneliness,⁴¹⁵ which intensifies the expansion of the state.⁴¹⁶ To paraphrase Robert Nisbet's intuition:

[T]he great tension of modernity—the concurrent rise of individualism and collectivism, and the struggle between the two for mastery—is really no tension at all. It *seemed* contradictory that the heroic age of nineteenth-century *laissez faire*, in which free men, free minds, and free markets were supposedly liberated from the chains imposed by throne and altar, had given way so easily to the tyrannies of Mussolini, Hitler, Stalin, and Mao. But it was only a contradiction . . . if you ignored the human impulse toward community that made totalitarianism seem desirable—the yearning for a feeling of participation, for a sense of belonging, for a cause larger than one's own individual purposes and a group to call one's own.⁴¹⁷

Third, the ongoing attempt to ensure employee freedom, autonomy, and ever-expanding economic advancement, a process that liberalism itself and Chief Justice Strine prefer, gives rise to the risk that the state *must* be employed orthogonally to constrain the arguably equal freedom of employers. All that is necessary for this risk to be realized is to combine the objectives of employee freedom, autonomy, and ambitious egalitarianism with the ideology of societal advancement and the willingness to follow Friedrich Nietzsche's example, which is signaled by the will to use power without moral restraint.⁴¹⁸ Consistent with this claim, Tocqueville reminds us that individualism, built on a foundation of equality without any common link—a stance that makes a sort of public virtue of indifference to those around us—may pave the pathway toward despotism, a move that is triggered by human isolation and its offspring: solip-

415. Rebecca Harris, *The loneliness epidemic: We're more connected than ever - but are we feeling more alone?*, INDEPENDENT (Mar. 30, 2015), <http://www.independent.co.uk/life-style/health-and-families/features/the-loneliness-epidemic-more-connected-than-ever-but-feeling-more-alone-10143206.html?printService=print> [https://perma.cc/LPE9-9H5N].

416. Sisk, *supra* note 414, at 1.

417. Ross Douthat, *The Quest for Community in the Age of Obama*, IMAGINATIVE CONSERVATIVE (Apr. 11, 2015), <http://www.theimaginativeconservative.org/2015/04/the-quest-for-community-in-the-age-of-obama.html> [https://perma.cc/SB7G-3F4J] (reviewing Nisbet).

418. Hutchison, *Waging War on the "Unfit?"*, *supra* note 155, at 21.

sism.⁴¹⁹ On the other hand, it is likely that the deployment of power without restraint (despotism) can only be combated by free and vibrant mediating institutions.⁴²⁰ Nonetheless, it appears that defenders of liberalism and the expansionary state, when confronted by either the Constitution's Free Exercise Clause, RFRA, the natural rights tradition, or Aristotelian teleology, are likely to "fear . . . any compromise" with those who fail to share their vision of "social progress," because compromise may result in "the resurgence of religious warfare, the re-enslavement of various populations, the loss of independence of women, and the abandonment of rights and equality under law."⁴²¹

Yet quite a different response is possible. Professor Deneen, a nuanced defender of religious liberty, submits that liberalism's fears are wrongheaded because "a reconsideration of liberalism's commitments" may instead be a necessary "[precondition] for securing equal human dignity and ordered liberty;" such a move does not inevitably engender a return to contemporary "conservatism" simply because contemporary versions of conservatism "[do] not offer . . . answer[s] to liberalism."⁴²² This is so because "conservatism" "is itself a species of liberalism."⁴²³ Instead, Deneen recommends a different more modest paradigm, one that does not capitulate to the dominant narrative of boundless "individual choice aimed at the satisfaction of appetite and consumption."⁴²⁴ Rather, Deneen favors a polar opposite trajectory in societal orientation, one that "requires a change in how we understand the human person in relationship to other persons, to nature, and the source of creation."⁴²⁵ While he admits that "the Constitution consolidated a number of political activities in the center, it left considerable room for local entities."⁴²⁶ Hence, "[t]he return to a more robust form of federalism would allow for greater local autonomy in establishing and cultivating local forms of culture and self-

419. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 472–73 (Henry Reeve & Alexander Teixeira De Mattos trans., 2013).

420. *Id.* at 485–88.

421. Deneen, *Unsustainable Liberalism*, *supra* note 8, at 29.

422. *Id.* at 29–30.

423. *Id.* at 30.

424. *Id.*

425. *Id.*

426. *Id.*

governance⁴²⁷ within limits that would exclude egregious constraints upon human liberty.⁴²⁸ This would provide space for localized, even “authoritative norm-shaping institutions” to flourish⁴²⁹ and battle the tyranny of the majority⁴³⁰ while also providing space for the return of “ordered liberty.”

Axiomatically, this may have the salutary benefit of inducing a substantial “withering away of the state,”⁴³¹ while diminishing the limitless pursuit of novel material goods. Thus, it is possible that the move toward a closer integration of “family, citizenship, church, neighborhood, community schools, and markets” may lead to the “cultivation of genuine local cultures” while shrinking, if not eliminating, liberalism’s self-contradictory impulse borne of its “twin depletions of moral and material reservoirs.”⁴³² To do otherwise risks “an oscillation between growing anarchy and likely martial imposition of order by an increasingly desperate state,”⁴³³ something Chief Justice Strine’s analysis and his version of liberalism fail to contemplate. Rightly understood, it is possible that Strine’s article will prompt an ongoing debate about the future sustainability of liberalism, an outcome that signifies that reading *A Job is Not a Hobby*, despite its contradictions, remains a worthwhile enterprise.

CONCLUSION

This Article establishes that Chief Justice Strine’s approach is rife with contradictions that render his argument insufficiently nuanced and persuasive. Contradiction yields to the conclusion that he has not fully grappled with either the challenging consequences of Progressivism’s relentless pursuit of “social progress” or the fact that what often counts as religious or secular in a given context is a function of different configurations of power.⁴³⁴ Neither has Strine delineated an adequate under-

427. *Id.*

428. *Id.*

429. *Id.*

430. TOCQUEVILLE, *supra* note 419, at 171.

431. Deneen, *Unsustainable Liberalism*, *supra* note 8, at 30.

432. *Id.* at 30–31.

433. *Id.* at 31.

434. WILLIAM T. CAVANAUGH, *THE MYTH OF RELIGIOUS VIOLENCE* 4 (2009).

standing of secularity's contested origins⁴³⁵ within a nation that often subscribes to two distinctly different stories of religious freedom. Difficulty mounts in light of the fact that the nation's religious and ethnic diversity has increased during the past century, which gives rise to value-pluralism reflected in different traditions and different religious views on moneymaking,⁴³⁶ a quandary that Strine's analysis fails to resolve. Nor has he fully deployed his indubitable corporate law expertise to cast a wide-ranging conception of corporate law and theory, an effort that would expose as highly disputable the belief that corporate separateness is a sufficiently robust doctrine that precludes corporations from exercising a religion within the meaning of RFRA. Equally true, this Article shows that paternalism and subordination predictably surface in the form of government intervention in the marketplace, a move that presents its own set of hurdles to the achievement of freedom for workers and employers while impelling further accretions in income inequality as the nation scuffles to define whether religious exemptions ought to be granted from generally applicable law.⁴³⁷ Finally, this Article shows that Strine's analysis is consistent with the gloomy, yet hopeful, conclusion that liberalism's contradictions may render it unsustainable, thus signifying that our society may yet have to discover man and nature anew.⁴³⁸

435. On philosopher Charles Taylor's account, there are three types of secularity. See JAMES SMITH, *supra* note 199, at 20.

436. Rienzi, *supra* note 308, at 60.

437. See, e.g., *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (disallowing religious accommodation for Native American peyote smokers and disagreeing with the claimants' argument that the assertion of a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), wherein governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest).

438. Deneen, *Unsustainable Liberalism*, *supra* note 8, at 25.