Hobby Lobby, Corporate Law, and Unsustainable Liberalism: A Reply to Judge Strine

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INTRODUCTION

It is likely that the dependence on, and the limits of, human cognition require us to adopt modes of analysis that make simplifying assumptions. Although this insight has been richly applied to the domain of corporate governance, it may be no less true, when applied to the sphere of rights. Despite the presence of bounded rationality in virtually all avenues of life, it has been, proclaimed by many that rights are universal. Whether or not such claim spring forth from simplifying assumptions, it is likely that they provoke debate regarding whether everyone possesses fundamental rights merely by virtue of being human or, alternatively, are rights simply a historically contingent, Western invention with limited logical and rational force, within the context of a diverse globe or nation? Commentators have, of course, given divergent answers to such questions. For instance, “Benjamin Constant, writing in the aftermath of the French Revolution, thought rights to be a modern innovation,” whereas Professor William Edmundson concludes that moral rights, “are best understood as protected choices.” But even Edmundson’s compressed claim is subject to dispute, meaning that contemporary political philosophy bounded by “public reason” as well as cascading and colliding claims of liberty, rights and freedom may be doomed to futility. This is so for a number of reasons. First, because many Westerners are

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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 Simon and Roy Radner).
3 WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 3 (2004).
4 Id.
5 JOHN GRAY, ISAIAH BERLIN, 7-10 (1996) [hereinafter GRAY, ISAIAH BERLIN] (examining Berlin’s view on freedom and liberty).
6 EDMUNDSON, supra note ___ at 5.
7 Id. at 193.
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.”

Second, this bracing claim is reinforced by virtue of the absence of any truly satisfactory way to reconcile modern hyper-pluralism with ambitious egalitarianism.

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 when such rights delimit the nation’s social safety net that progressives and liberals have constructed and sustained through novel interpretation of the law. It is plausible that the construction of the social safety net, the linchpin of the pursuit of government sponsored progress, has issued forth within the parameters of the insistent search for perfection despite the empirically verifiable observation that “Mankind’s quest for perfection has always turned dark.” Hence it should surprise no one that America’s experimental and perhaps utilitarian quest for perfection, one that took on ravenous form during the Progressive Era and which was amply reified during the New Deal, Fair Deal and the New Frontier, cannot necessarily be seen as a blessing for civil liberties, and in particular for the civil liberties and economic status of the marginalized among us. Beyond the vexed consequences for marginalized Americans surfacing from liberalism’s perfectionist quest, it is possible that the liberal experiment and liberal society, taken together, have become


9 JOHN GRAY, ISAIAH BERLIN, supra note __ at 14-15.


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

12 EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, 3-4 (2006) [hereinafter, EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION] (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”).


14 EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, supra note ___ at 102.

15 Id. (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).
inexorably “postliberal” and more authoritarian\(^\text{16}\) perhaps as a consequence of the fact that liberalism draws down on its preliberal inheritance.\(^\text{17}\)

In his recent article, *A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and its Problematic Implications*\(^\text{18}\) (*A Job is Not a Hobby*) Judge Leo Strine endeavors to fashion an unbreakable link between the Supreme Court’s decision in *Burwell v. Hobby Lobby*\(^\text{19}\) in combination with the Court’s recent corporate law jurisprudence in *Citizens United*,\(^\text{20}\) and the reappearance of “corporate paternalism.”\(^\text{21}\) Likewise, Strine stoutly defends the pursuit of “social progress.” This quest may include efforts by self-interested political actors to seize government power in order to drive the majoritarian, if not the authoritarian\(^\text{22}\) pursuit of utilitarianism. Seizure by self-interested actors claiming the mantle of the public interests raises the specter of rent-seeking.\(^\text{23}\) Constructing an analytical frame of reference that functions reliably with what


\(^\text{17}\)Deneen, *Unsustainable Liberalism,* supra note\(\_\) at 1.


\(^\text{19}\)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\(^\text{19}\) (ACA). Apparently, “[u]nless an exemption applies, ACA requires employer’s group health plan or group-health-insurance coverage to furnish ‘preventive care and screenings’ for women without ‘any cost sharing requirements.’” *Hobby Lobby*, 134 S. Ct. at 2762 (citing 42 U.S.C. § 300gg—13(a) (4)). This provision gives rise to a so-called contraceptive mandate. The mandate is codified at 26 U. S. C. §5000A (f) (2); §§4980H (a) (generally requiring employers with 50 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 effected 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 was whether RFRA provides corporations animated by religious sensibilities with the right to an accommodation. The Court found the government’s claim that the objecting firms’ for-profit status extirpated their RFRA claims to be unworkable. Implicitly, the Court decided that free exercise exemptions for profit-pursuing corporations are not necessarily a form of unjustifiable favoritism. For a discussion of *Hobby Lobby* within the realm of corporate law see Harry G. Hutchison, *Religious Liberty for Employers as Corporations, Natural Persons or Mythical Beings? A Reply to Gans,* 120 Penn St. L. Rev. (forthcoming, 2015) available at ssrn.com/abstract=2685872 [hereinafter, Hutchison, *Religious Liberty for Employers as Corporations*].


\(^\text{21}\)Strine, *supra* note\(\_\) at 83.

\(^\text{22}\)Pildes, *supra* note\(\_\) at 125, 125-126 (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 leverage that control into more enduring and effective political domination and insight that grounds itself in the commonplace observation that democratic processes must be structured through law but those in control of designing those laws are themselves self-interested political actors).

\(^\text{23}\)Rent seeking is the socially costly pursuit of wealth transfers and can be contrasted with traditional competitive profit seeking or entrepreneurship because 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
Richard Epstein calls the “Progressive view of social progress,” one which equates active government with good government, Strine reasons that the instantiation of the nation’s social safety net during the Progressive Era and the New Deal destabilized and rendered “corporate paternalism” less menacing to workers. Nonetheless, he is disturbed by contemporary trends that ostensibly countenance third-party harms 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, an employer’s “[c]onduct remains subject to regulation for the protection of society.”

This essay responds to Strine’s observations and analysis in several ways. Part I summarizes Judge Strine’s argument and outlines the issues arising from it. Part II examines whether Judge Strine’s somewhat utilitarian calculus eradicates debate or rather sparks it. This inspection is complemented 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 plausibly as a truly secular society and the implications of this heavily contested claim for the question of whether religious exemptions ought to be available for for-profit corporations. Part IV questions whether Supreme Court jurisprudence has reinstituted “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

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24 Epstein, How Progressives Rewrote the Constitution, supra note ___ at 7.
25 See e.g., Strine, supra note ___ at 81 & 82-83 (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 during the Roosevelt administration).
26 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. 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”).
27 See e.g., Strine, supra note ___ at 83 (accepting the notion that conduct remains subject to regulation for the protection of society (citing Cantwell v. Connecticut, 310 U. S. 296, 303-04 (1940))).
grounded in contractarianism and law and economic scholarship.\textsuperscript{28} Part V summarizes the contradictions that compromise Judge Strine’s analysis. Taken as a whole, Judge 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. JUDGE STRINE’S ANALYSIS AND ARGUMENT

A. Prolegomena

Brandishing hazy evidence of the history of employer efforts to restrict workers’ freedom during the late nineteenth century and the early twentieth century,\textsuperscript{29} Strine brands employer hostility toward employee autonomy (economic and otherwise) as an attempt to enforce corporate paternalism\textsuperscript{30} or, alternatively, as a brazen effort to reinstitute feudalism.\textsuperscript{31} 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.\textsuperscript{32} Impressed by the early efforts of labor advocates, which were designed to address this situation, Strine concedes that the efficacy of their efforts were limited as “legal guarantees of freedom for workers evolved slowly.”\textsuperscript{33} He also submits that material improvements within the employment arena were scattered among the several states and hardly national in scope.\textsuperscript{34} Evidently, more enduring change within the domain of social progress would await the institution of President Roosevelt’s New Deal program which enacted fundamental changes to the pre-existing paradigm in labor-management relations.\textsuperscript{35} Changes that were largely upheld by the courts.\textsuperscript{36}

Then came \textit{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

\textsuperscript{28} For an introduction to contractarianism premised on law and economics see, Bainbridge, \textit{Nexus of Contracts}, supra note ___ 9-11. \textit{See also infra}, Part IV.

\textsuperscript{29} Strine, \textit{supra} note ___ 77-80 (providing anecdotes in support of his claims).

\textsuperscript{30} \textit{Id.} at 78-81.

\textsuperscript{31} \textit{Id.} at 81-82.

\textsuperscript{32} \textit{Id.} at 80-81 (labor advocates sought to obtain the right of workers to paid at regular intervals in some cases and law requiring employers to workers in case rather than scrip were enacted at the state level).

\textsuperscript{33} \textit{Id.} at 80.

\textsuperscript{34} \textit{See e.g., id at} 80 (conceding that even with the growth of unions, freedom for workers evolved slowly).

\textsuperscript{35} \textit{Id.} at 82.

\textsuperscript{36} \textit{Id.} at 83 (Strine notes that during the New Deal, employer objections took the form 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 he notes this move was largely unsuccessful).
embedded in the Religious Freedom Restoration Act\(^{37}\) (RFRA) as a means to tax the rest of us.\(^{38}\) But before fleshing out Strine’s examination of this case and \textit{Citizens United},\(^{39}\) and their combined implications for corporate law jurisprudence, it is helpful to 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 since most employees in a market economy must work in order to feed, house and otherwise provide for themselves and their families.\(^{40}\) Strine’s approach ferments with distaste for such anodyne motivations, motivations that have consumed the history of labor. Quotidian ambitions are deeply scorned in comparison with motivations of individuals who are stirred to “work solely because [their] jobs fulfill all of [their] emotional, aesthetic, spiritual, avocational, or hedonic needs.”\(^{41}\) Strine reasons that work is principally understood as an imposition signifying that most workers \textit{must} take jobs, perhaps even a \textit{particular} job, which thereby exposes them to the risk that they will spend a majority of their waking hours in a domain where the rules are set by others.\(^{42}\) 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.\(^{43}\) 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, 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.

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. This employer-led response, so the story continues, subjected workers to the possibility of “wage slavery” rather than freedom that is defined in opposition to slavery as “a state of exemption from the power or control of another.” 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 noting: “Emancipation . . . settled for all time [the] American paradox . . . 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.” 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 enterprise. Suffice it to say, Professor Foner’s analysis is contestable on several levels.

With evident relish and disapproval, Strine’s jeremiad proceeds by alluding to the conduct of George Pullman and other nineteenth century owners, an approach which complements his analysis. Describing such owners as domineering tyrants, who manifested their dedication to “benevolent” paternalism by insisting that workers live in company towns, built and designed to house the company’s employees, company hierarchs kept the towns dry to ensure that liquor remained outside of the arteries of working men. At times, the conduct of some employers was driven by religious zeal or alternatively employers strove to use religion to enforce their values

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44 Gail Heriot, The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law, 28 Ga. L. REV. 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.”).

45 Strine supra note 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.

46 Id. at 80-82.

47 Id. at 78.

48 Id.

49 See e.g., HARRY G. FRANKFURT, ON INEQUALITY (2015) (Showing that economic inequality is one of the most divisive issues of our time but positing that few would argue that inequality is a greater evil than poverty signifying that the poor suffer because they don’t have enough, not because others have more).

50 Strine, supra note 73.
and perhaps ensure productivity. This archetype, on Strine’s account, applied particularly to 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. Strine states that as a consequence of such Ford-like efforts, American workers were obliged to work for strong-willed employers, a development that spurred the rise of the early labor movement as a counterweight to corporate power. “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.” Building on this observation, Strine also critiques employers who imposed (economic) inequality by paying workers in scrip, which was redeemable only at the company store.

Expectedly, Strine deduces that early efforts of labor reformers were inadequate in transforming the workplace. Prompted by such failures, he attends to President Roosevelt’s New Deal, which enabled several state-level labor reforms to become federal law. Erected principally on Progressive Era ideals and, more particularly, the necessity of constitutional change, the New Deal culminated in Roosevelt’s “Second Bill of Rights” speech in 1944 claiming “‘Necessitous men are not free men.’ People who are hungry and out of a job are the stuff of which dictatorships are made.” Strine surrenders to the opinion that employer led resistance to Roosevelt’s goals and those of FDR’s contemporary 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. Employer objections were largely overruled by the Supreme Court during the New Deal and during much of the post-New Deal era. Adjudicatory rejection was fueled by deference to federal statutory innovation procured by a broad reading of the Commerce Clause.

\[\text{id}\]
\[\text{id} at 81.\]
\[\text{id} at 80.\]
\[\text{id} at 73.\]
\[\text{id} at 82.\]
\[\text{Epstein, HOW PROGRESSIVES REWROTE THE CONSTITUTION, supra note } \text{ at 53-74 (outlining on the idea that Progressive sought to enlarge the scope and reach of the Commerce Clause).}\]
\[\text{Strine, supra note } \text{ at 82-83.}\]
\[\text{id} at 82-85.\]
\[\text{id} at 83 (noting that employer’s sought exemptions or opt-outs from employment law initiatives on grounds that funding certain “secular” causes burdened employers’ religious beliefs).\]
Advancing a profuse panegyric on the New Deal and later Fair Deal reforms, Strine concentrates on legislation such as the Fair Labor Standards Act (FLSA) (which proscribed payment in “scrip” and mandated minimum wage payments); the National Labor Relations Act (NLRA) (which protected concerted activities by workers including their right to form, join and assist labor unions); the Social Security Act (which provided for old age insurance and welfare payments for the poor); and other programs. He caps 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.”

Although this contention evades the possibility that FDR’s program of positive freedom enacted government paternalism, Strine’s ensuing remarks acclaim the “social progress” movement’s subsequent embrace of healthcare as one of the “minimum essential guarantees of economic security, dignity and freedom.” Commending President Truman’s claim that New Deal era reforms “strengthened the material foundations of our democratic ideals,” Strine welcomes additional efforts, including the ambitious promise of President John Kennedy’s “New Frontier,” which culminated in an uneven effort to enact comprehensive federally mandated health care.

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 largely as a successful effort 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 policy. Although employer-based healthcare became a widespread phenomenon, this approach, nonetheless, left 18 percent of employed workers without health insurance and, certainly, an even higher percentage of the unemployed.
experienced this fate. Highlighting gaps in health insurance coverage, Strine lauds the Affordable Care Act, under which full-time jobs generally must come with access to health insurance or, alternatively, health coverage is imposed through individual mandates. Beyond mandating health insurance coverage for many Americans but exempting many others, the ACA set minimum requirements, which demanded that each health insurance policy include coverage for a broad range of putatively essential health benefits including the hotly contested contraceptive mandate. Remaining oblivious to the large number of exemptions granted by the Obama administration, Strine paradoxically directs his fire at a small number of religious employers, who are prepared to provide health insurance without the mandated contraceptive coverage. The core of Strine’s ire is concentrated on employers, who like the plaintiffs in Hobby Lobby, continue to believe that religious freedom remains a fundamental liberty and accordingly, strive to opt out of a small fraction of the government’s overall “reform” effort. That is the subject to which I now turn.

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

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70 Id. at 88-89.
71 Id. at 90.
72 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”). 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 1400 waivers from ACA regulations without statutory authority).
73 Strine, supra note ___ at 90.
74 See Hobby Lobby, 134 S. Ct. at 2763-64.
75 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).
76 Strine, supra note ___ at 90-100.
taxpayers foot the bill for such insurance.77 This move is attended by an additional first order outrage: the demand that objecting employers be excluded from paying any taxes that might fund services they find offensive.78 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 but, apparently, in nearly every case, the court . . . assumed the sincerity of the employer’s objections, but then found that society’s interest in a secular system of laws overcame them.”79 Endorsing *Cantwell v. State of Connecticut*’s80 approach, but not necessarily the Court’s 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.”81 While I will have much more to say about Strine’s dependence on dicta taken from *Cantwell* later,82 he maintains that *Cantwell*’s stated proposition regarding the First Amendment, caused federal courts to subsequently disallow a series of religious objections by employers to federal social welfare and tax statutes.83 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 ACA84 and the suggestion that the statute’s subsequent collision with the fundamental liberty claims brought by the three corporate entities, which made up the consolidated *Hobby Lobby* case, is unwarranted.

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.85 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 [which are] external to corporate law”86 itself. Strine then argues that the “*Hobby Lobby* [decision] compounds those problems.”87 He is

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77 Id. at 98-99.
78 Id. at 99.
79 Id. at 83.
81 Id. at 303-304.
82 See infra Part III.
83 Strine, *supra* note___ at 83.
84 Id. at 83-90.
85 Id. at 107—113.
86 Id. at 107.
87 Id.
roused by the Court’s (alleged) selective reading of corporate law sources, which facilitates the following proposition: that as a general matter for-profit corporations may treat as ends, other interests rather than stockholder welfare including the interests of their workers, consumers, or the communities in which the firms operate.88 Although, it may be boorish to opine that 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. 89 Although, Delaware case law90 and corporate law scholarship exist in support of the proposition that directors ought to maximize shareholders wealth, questions surface regarding whether every decision entered into by the board of directors must maximize shareholder wealth.91 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.”92 This contention 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 implications issuing forth from the Court’s recent decision allowing corporations to fund political contributions93 or, alternatively, he adverts to the Court’s recent decision constraining the ability of the Affordable Care Act to expand Medicaid coverage within the jurisdiction of objecting states.94 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

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88 *Id.* at 107.
89 *Id.* at 107-108 (considering corporations generally, as well as Benefit Corporations, which are available in Delaware).
90 *See e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. 506 A.2d 173, 182 (Del. 1986).
91 *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).
92 Strine, *supra* note__ at 108.
placing at risk some, if not all, elements of the nation’s social safety net, while threatening to vitiate the American dream of economic autonomy. More troubling is the prospect that the combined force of Citizens United, National Federation of Indep. Bus. v. Sebelius and Hobby Lobby neutralizes Congress’ ability to further enlarge the nation’s social safety net thus jeopardizing the future freedom of employees who work for corporations and whose lives are influenced by corporate conduct. 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. Such assertions imply that employers writ large, and religious employers, in particular, have been roused in response to a more than a century-long escalation in the size and power of the “secular state” 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 thus understood, valorizes this process, elevates the rights of elites who wield corporate power, 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. 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, rights that are evidently instituted by the state premised on a largely utilitarian calculus. He develops his

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95 Strine, supra note ___ at 98.
96 Id. at 114 (discussing cases that predated Hobby Lobby).
97 Id. at 76.
98 Id.
99 Id. at 75.
100 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].
101 Strine, supra note ___ at 76.
102 See AMITY SHLAES, THE FORGOTTEN MAN 127-128 (the phrase “The Forgotten Man” was utilized to great rhetorical effect by FDR to represent the common workingman but actually arose more than 50 years before in a lecture by William Graham Sumner to represent the hidden taxpayer, the average citizen—not someone received benefits but rather someone who paid into the government).
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 likely arose out of sensibilities that originated largely within Christianity. Set free from a political theology that challenges secularism, secular thought advanced forward by emphasizing neutrality in achieving the “Good” life. Myriad versions of the “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.” A form of this rights’ theme may be found within the thought of Jeremy Bentham and his focus on public morality, which surfaces in his examination of the institutions and activities of government. Moreover, the focus on rights, at the level of practice, can be seen in the constitutional innovations of the American and French Revolutions. Perhaps owing a debt to these themes and, ironically enough, to the political theology of apostles and theologians, Strine’s essay can be seen as an endeavor to preserve the imprescriptible rights of workers thereby making it difficult for employers (religious or not) to push aside rights surfacing in social welfare legislation.

Operating simultaneously on a number of levels, A Job is Not a Hobby elevates many issues. These issues are intertwined and overlap, which, of course, complicates things. 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 what the good (liberal?) society ought to consist of, and be informed by. Declining to delineate an explicit or

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104 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 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 (January/February, 2016).
105 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, 16-17 (January/February, 2016) [hereinafter, Smith Persuasion and Public Theology].
106 Waldron, Introduction, supra note__ at 1.
108 Waldron, supra note__ at 1.
109 See Jacobs, supra note__ at 9-10.
110 My debt to the authors of the Declaration of the Rights of Man and the Citizen (French National Assembly, 27 August 1789), Article II should be obvious. See also, Waldron, Introduction, supra note__ at 1.
even a speculative account that fits thoroughly within the utilitarian framework offered by writers such as Jeremy Bentham,111 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 employees.112 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 the rational terms of 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 defendable construct for cooperation among persons having no comprehensive conception of the good in common.113 Putting aside for the moment Rawls’ doubtful proposition and concentrating on utilitarianism in Millian terms, evidently it is one thing to suggest that utilitarian theory can generate moral considerations that may have the special force of rights, but it is arguably another thing to show that these so-called utilitarian rights have the same content as rights that are cherished in the liberal (or perhaps preliberal)114 tradition115 that appears to have motivated the Framers. Thus an incipient conflict among theories of rights materializes, a dispute that may not be resolvable on the basis of rational analysis itself. Lack of resolvability is foreshadowed by, at least, two developments. First, as John Gray observes, “[i]f belief in human rationality was a scientific theory [,] it would long since have been abandoned.”116 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.”117 If true, no solution worth defending is likely to surface regarding the appropriate metric for interpreting rights talk, a puzzle that likely infects debates

112 See id.
113 See e.g., JOHN GRAY, ISAIAH BERLIN, supra note___ at 8.
114 See Deneen, Unsustainable Liberalism, supra note____ at 1.
115 Waldron, Introduction, supra note__ at 1.
regarding a wide-range of issues. Assuming arguendo, some form of utilitarianism can generate a philosophic consensus, this consensus, however questionable it may be, is placed under further 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. Rather, I shall 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, Strine’s approach provokes the fractious question regarding 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. 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 century and the invention of the individual during the epoch that commenced during the first century. The question of origins assumes center stage in disputes regarding the correct interpretation of the story of religious freedom in the United States. Today this simmering debate crystalizes itself

118 CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMIC POLICY RESEARCH AND GOVERNMENT PERFORMANCE, 3 (2006)
121 For a rich exposition of the two stories of American religious freedom, see, STEVEN SMITH, supra note__ 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).
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.\textsuperscript{122}

Third, brooding beneath the surface of heated statutory and constitutional debates is a
related issue. Since Americans live in a cultural, but not necessarily political or constitutional,
epoch that James Davison Hunter describes as a “‘late modern, post-secular world,’”\textsuperscript{123} which
finds expression in an unstable pluralism signifying a dazed, confounding and confused
milieu,\textsuperscript{124} then the proper role of corporate law in a pluralistic society that elevates human choice
amidst a roiling sea of incommensurable values remains difficult to resolve. This difficulty
comes alive by noting Strine’s unwillingness to defend the preservation of the “impresscriptible
rights of humans” 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 necessitates an in depth assessment of
Strine’s critique of \textit{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,\textsuperscript{125} likely has more in common with Isaiah Berlin’s understanding of freedom
arising out of what John Gray calls \textit{agonistic liberalism}.\textsuperscript{126} Properly appreciated, agonistic
liberalism is simply a liberalism of conflict among inherently rivalrous goods.\textsuperscript{127} 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.\textsuperscript{128} Still,
if the choices we make remain incommensurable in the long term, this may place civil society at

\textsuperscript{122} Hutchison, \textit{Metaphysical Univocity}, supra note\textsuperscript{___} at 101.
\textsuperscript{124} Hunter, \textit{Law, Religion, and the Common Good}, supra note\textsuperscript{___} at 1068-69.
\textsuperscript{125} See e.g., Deneen, \textit{Unsustainable Liberalism}, supra note\textsuperscript{___} at 1-14.
\textsuperscript{126} \textit{Gray}, supra note\textsuperscript{___} at 8.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
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 commentators\(^{129}\) that imply progress, with its evolving respect for human dignity and autonomy, has taken a conspicuous role as “part of history’s march from feudalism.”\(^{130}\) 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.\(^{131}\) 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,\(^{132}\) Strine appears to accept a version of utilitarianism embedded in the New Deal’s admonition that “Necessitous Men are Not Free Men,” an admonishment that 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.\(^{133}\) This process recalls the alleged conflict between liberty of contract and social progress doctrines that rightly or wrongly have been tied to Lochnerian jurisprudence, which, on some accounts, produced a highly disputed doctrine that protected one version of individualism against its mortal enemy: majoritarian paternalism.\(^{134}\) 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.\(^{135}\) Evidently Strine’s vision of inexorable social progress, like Woodrow


\(^{130}\) See id. at 62.

\(^{131}\) RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 14 (2005) (describing Wilson’s historicism); see also, Greenfield, supra note___ at 62 (describing modernity’s march).

\(^{132}\) GRAY, ISAIAH BERLIN, supra note___ at 9.

\(^{133}\) Strine, supra note___ at 82.

\(^{134}\) 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).

\(^{135}\) Strine, supra note___ at 85-88 (explaining this movement).
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. 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. 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 contract it. Otherwise framed the question becomes, does progressive thought stand as a paragon of progress or entrenched power that inevitably provides private benefits as opposed to public ones? This is the question to which I now turn.

B. The Consequences of the Pursuit of “Social Progress”

As I have argued 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.” Although Progressives saw themselves as leaders of a novel movement, it is manifest that the Progressive movement was “based on the paternalistic and collectivist threads that ran deeply through the Anglo-American common-law tradition.”

Like the Fabian socialists, their counterparts in Britain, who harkened back to the “Tory paternalism” of the 18th century, American

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136 PESTRITTO, supra note 8.
137 See infra Part V.
Progressives championed various “protective” labor laws (particularly regarding women, children, and other supposedly vulnerable classes of workers), liquor prohibition and other forms of morals legislation, and in general a category of laws called ‘social legislation’ by modern scholars.\footnote{Id.} “Progressive ideals, infused with Herbert Spencer’s thinking, were ‘essentially a variant of English utilitarianism with a more developed argument on progress through evolution.’”\footnote{Hutchison, Choice, Progressive Values, and Corporate Law, supra note ___ at 467.} In Spencer’s account, “progress” was “not an accident, but a necessity. Surely must evil and immorality disappear; surely must men become perfect.”\footnote{See e.g., Philip Rieff, The Triumph of the Therapeutic: Uses of Faith After Freud 5 (40\textsuperscript{th} Anniversary ed. 2006) (quoting Herbert Spencer).} 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.\footnote{Hutchison, Choice, Progressive Values, and Corporate Law, supra note ___ at 467.} This maneuver coincides with the onset of authoritarianism that appears to infect modern democracies, a tendency that philosopher 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 richly by private interest-groups in the name of the public interest.\footnote{John Gray, Post-Liberalism: Studies in Political Thought 10-11 (1996) [hereinafter, Gray, Post-Liberalism].} 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.”\footnote{Id. at 12.} Thus appreciated, progressive thought and the evolution of 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 issued forth out of both conservative and liberal ideas.\(^{147}\) Evidently some of these ideas were grounded in quasi-science,\(^{148}\) a move that reflects the “modern spirit,” which is deeply impatient with limits and which, correspondingly, assumes the perfectibility of man and the conquerability of nature (biology).\(^{149}\) Progressive ideals and policies, however antique as they may be, surfaced first in Great Britain and spread to the United States and were spawned, at least in part, by the belief that scientific experimentation leads, unavoidably, to human and societal improvement.\(^{150}\) Within the boundaries of the United States these currents emphasized both the Ionian Enchantment,\(^{151}\) and biological determinism;\(^{152}\) both inclinations were fostered by “creative extensions of the police power and commerce power.”\(^{153}\) At the same time the liberty interest of individuals was subject to a shrinkage that mirrored Justice Holmes’ dissent in \textit{Lochner v. New York}, which supported a constrained conception of the Fourteenth Amendment and was fortified by an expansive understanding of the “common interest.”\(^{154}\) Taken as a whole, this analysis implied that human liberty\(^{155}\) “did not mean freedom from government coercion and control.”\(^{156}\)

Since power tends naturally toward manipulation and control, it would be unfair to claim that public intellectuals and institutions operating during the Progressive Era invented contempt\(^{157}\) 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—


\(^{148}\) As Black shows, “[s]cience offers the most potent weapon in man’s determination to resist the call of moral restrain” and accordingly, many progressives took the lead in forging a new science of human oppression: race science. Black, \textit{supra} note ___ 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 \textit{id}. This linkage remade undesirables into “the hereditarily unfit and elevated exclusion to a matter of national and racial health.” Bernstein and Leonard, \textit{supra} note ___ 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.” \textit{Id}.


\(^{150}\) Hutchison, \textit{Waging War on the “Unfit,” supra note ___ at 2-6.}

\(^{151}\) \textit{Id.} at 2.

\(^{152}\) \textit{Id}

\(^{153}\) \textit{Id.} at 3.

\(^{154}\) \textit{Id.} at 18.

\(^{155}\) \textit{Id}


\(^{157}\) Hunter, \textit{To Change the World, supra note ___ at 188.}
were unworthy of social uplift. Among the favored groups were Caucasian American males. Emphasizing society’s need to control the unfit—women and members of minority groups—progressive intellectuals, turned New Dealers refrained from concentrating on the public interest. Some, but not all Progressives, emphasized racial purity or gender superiority. Progressive icon, Woodrow Wilson, for example, insisted that giving blacks the right to vote was “the foundation of every evil in this country.” As president, and, as part of an effort to hasten the aborning demise of African American aspirations, he ordered the re-segregation of government offices in 1913. Other Progressives—largely on sociological grounds—led the effort to limit the hours and occupational choices available to women. While Strine defends wage and hour initiatives arising out of state efforts that eventually culminated in the enactment of FLSA, he fails to explain why the percentage of children in the workforce declined consistently before the regulation of child labor or why social progress statutes limiting the hours of work for women were successfully defended by Progressives on grounds of innate female inferiority. 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. Neither does Strine explicate 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. 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.

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158 Bernstein & Leonard, supra note___ at 180.
159 Id. at 179-81.
160 Id. at 180.
161 EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, supra note__ at 72.
164 EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, supra note__ at 90.
166 EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, supra note__ at 62.
167 Id. at 90.
168 Hutchison, Choice, Progressive Values and Corporate Law, supra note___ at 471-72 n. 232.
169 Id. at 474.
170 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
Responding to the force of regulatory subordination tied to bi-partisan 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.” 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 Judge Strine. 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” Such effects have contributed tangibly to poverty, inequality and subordination in the context of the nation’s history. For example, during both the early and late twentieth century, labor organizations, the beneficiaries of New Deal Labor law, institutionalized discriminatory practices at the expense of African American workers. Correlatively, the “widening unemployment gap between white and black Americans that commenced during the Great Depressions remains with us today,” 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. “Concurrently, New Deal Progressives provided special favors for “Big Business”—and others.” Importantly,


Bernstein & Leonard, supra note ___ at 180.

Hutchison, Waging War on the “Unfit,” supra note ___ at 20-34.

See generally, id.


Id. at 510-513.

Hutchison, Choice, Progressive Values and Corporate Law, supra note ___ at 474.
many 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.179

Hence, “the Progressive move toward a centralized, regulatory-administrative state glossed over the corrupting tendency of power” unhindered by constitutional restraint.180 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 risen dramatically in a move that cripples civil society. 181

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,182 is buttressed by contemporary evidence showing that minimum wage regimes currently disfavor the poor by increasing the number and percentage of unemployed 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.183 Thus it is highly likely that Strine’s defense of the 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

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179 Hutchison, Achieving Our Future in the Age of Obama, supra note ___ at 491-492.
180 Hutchison, Choice, Progressive Values and Corporate Law, supra note ___ at 474-475.
181 HUNTER, TO CHANGE THE WORLD, supra note ___ at 154 (suggesting that “State has permeated civil society to such an extent that the two are mostly indistinguishable”).
182 See e.g., Hutchison, Choice, Progressive Values and Corporate Law, supra note ___ at 511-513 & 516-517.
183 Id. at 514.
To repeat, America’s ongoing process of exclusion, often cloaked in social justice speech, is “incentivized by the naked self-interest of powerful interest groups” that include “Big Business, Big Labor and Big Lobbyist,” a process that may diminish rather than contribute to economic autonomy for many workers.

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. As explicated by John Gray, “corporate 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.” 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 value; a move that would signify that the soft plaster of the ACA’s social progress platform has been eroded by hard facts. Whether the passage of the ACA will fully enable Big Pharma to extract economic rents as planned, Strine defends the passage and full enforcement of the ACA on social progress grounds against a group of relatively small employers (employers’ who 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,

184 Id. at 477.
185 Id. (explaining how the interest of disadvantaged workers sacrificed through labor law reform initiatives in order to favor the affluent).
186 Hutchison, Achieving Our Future in the Age of Obama, supra note __ at 492.
188 Hutchison, Achieving Our Future in the Age of Obama, supra note __ at 522 (citing John Gray).
190 Big Pharma’s ObamaCare Reward for helping pass the law, the drug companies get price controls, the WSJ, February 5, 2015, available at http://www.wsj.com/article_email/big-pharmas-obamacare-reward-1423180690-lMyQjAxMTI2MzA2MjQwNTI1Wj.
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 . . . exigencies of the nation’s progress.191

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 instantiated during the New Deal, programs that facilitated cartels, which redistributed income from disadvantaged workers and provided benefits for individuals and groups, which were already advantaged. Although charity commends muted commentary, it is possible that this process—fused with a patina of social justice rhetoric—resembles a masquerade.192 This does not necessarily indicate that Strine or other contemporary liberals and progressives 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 its normative claims and its consequences, are highly questionable. On close inspection, policies, which 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 section illustrates, the growth in state power, has consequences for the free exercise of religion, an issue that has consumed countless debates during the nation’s Founding, debates that continue today.

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

191 Hutchison, Achieving Our Future in the Age of Obama, supra note__ at 522 (quoting John Gray).
192 Hutchison, Choice, Progressive Values and Corporate Law, supra note___ at 474.
192 Id. at 474-475.
Any intelligible effort to define the proper relationship between government and religion is a thorny enterprise that has vexed jurist, clerics and governments for thousands of years.\textsuperscript{193} The idea of a truly secular society may emerge as a cultural artifact that surfaces in what Charles Taylor calls the prevailing immanent frame orientation.\textsuperscript{194} 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,\textsuperscript{195} nevertheless, it remains questionable whether a truly secular society is possible.\textsuperscript{196} Indeed, Rémi Brague richly disputes the possibility of such a society\textsuperscript{197} and Strine declines to prove its existence. Nonetheless, Strine contends that the \textit{Hobby Lobby} case in combination with the Supreme Court’s earlier decisions involving corporations\textsuperscript{198} improperly constrict government’s capacity to extend the social safety net further. Embarking on an effort to illustrate “how those decisions put pressure on corporate law itself”\textsuperscript{199} and referencing \textit{Hobby Lobby} in particular, he avers this pressure was not required by RFRA itself.\textsuperscript{200} Presumably \textit{Citizens United} and \textit{Hobby Lobby} conjoin 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

\footnotesize{\textsuperscript{193} PETER L. BERGER, THE MANY ALTARS OF MODERNITY: TOWARD A PARADIGM FOR RELIGION IN A PLURALIST AGE xii (2014).}  
\footnotesize{\textsuperscript{194} See 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).}  
\footnotesize{\textsuperscript{195} Id.}  
\footnotesize{\textsuperscript{196} Rémi Brague, The Impossibility of Secular Society: without a transcendent horizon, society cannot endure, FIRST THINGS Magazine, October 2013 at 1, available at http://www.firstthings.com/article/2013/10/the-impossibility-of-secular-society (accessed 12/1/2015) (Brague offers two-and-a-half theses including the contentions that (1) a purely secular society simply cannot survive in the long run, 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; (3) 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). See also, JAMES SMITH, supra note at 42 (describing Taylor’s account of three types of secularity wherein (1) secularity\textsubscript{1} 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\textsubscript{2} offers a “more ‘modern’ definition of the secular as a-religious—neutral, unbiased, ‘objective,’ and (3) secularity\textsubscript{3}, which is identified as an age “of contested belief, where religious belief is no longer axiomatic”).}  
\footnotesize{\textsuperscript{197} See Strine, supra note ___ at 90-100 & 107-113.}  
\footnotesize{\textsuperscript{199} Strine, supra note ___ at 112.}  
\footnotesize{\textsuperscript{200} Id. at 115.}
insidious threat to the nation’s workers, the survival of the secular state, and responsible
corporate law itself.\textsuperscript{201}

Presenting a fulsome parade of horribles, Strine reacts to this situation with resolute
conviction. He asserts that the nation is unqualifiedly “secular” and accordingly must enforce
“secular” principles. This contention appears to be at variance with John Locke’s conception of
the state,\textsuperscript{202} but corresponds with Professor Larry Seidentop’s question: does it still makes sense
to talk about “the West” . . . as [p]eople, who live in the nations once described as part of
Christendom—what many would now call the post-Christian World—seem to have lost their
moral bearings?\textsuperscript{203} If Siedentop’s question is answered affirmatively, 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.”\textsuperscript{204} 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.”\textsuperscript{205} Consistent with Siedentop’s observations, but not his conclusions,\textsuperscript{206} 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,\textsuperscript{207}
Strine repeatedly ties freedom to the elimination of necessity and human want.\textsuperscript{208} 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

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\item \textsuperscript{201} Id. at 107 (Strine has previously observed that \textit{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 and he now argues that \textit{Hobby Lobby} compounds those problems).
\item \textsuperscript{202} \textit{JOHN LOCKE, LOCKE’S TWO TREATISES OF GOVERNMENT} 223 (Peter Laslett 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). \textit{See also}, \textit{RON HIGHFIELD, GOD, FREEDOM & HUMAN DIGNITY EMBRACING A
\item \textsuperscript{203} Siedentop, \textit{supra} note ___ at 1.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} Id.
\item \textsuperscript{206} 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, whether we like
it or not).
\item \textsuperscript{207} Strine, \textit{supra} note ___ at 115.
\item \textsuperscript{208} Id. at 83.
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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.”

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. On the other hand powerful elites within the Latin West react to such claims “with a shrug, 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 quiet private belief belongs to the more advanced among us. 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, 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 of religious freedom and the tragedy of clashing values that has arisen, in part, out of deism, the intellectual movement that dominated eighteenth-century philosophy. This tension, signals a conflict between incommensurable principles that is lucidly reflected in the writings of Tocqueville and others.

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210 *Id.* at 103.


213 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).

214 See, STEVEN SMITH, supra note ___ 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).

215 See e.g., MARC O. DEGIROLAMI *THE TRAGEDY OF RELIGIOUS FREEDOM* 1-12, (2013) (showing 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 and given this conclusion, offering a middle course in examining religious liberty that is grounded in tragedy and history (premised on the legal and social traditions of the nation) that attempts to respond to the plurality of ideas about religion itself and the state’s proper relationship to them, a process that does not concede that constitutional fidelity and the rule of law are damaged when judges are forthright in confronting the clashing vales that underwrite so many religious liberty cases).

216 HIGHFIELD, supra note ___ at 26.
A short period after reaching the New World, Tocqueville was greeted by a flurry of conflicting impressions. Arriving after Thomas Jefferson released his proclamation that the Religion Clauses created a wall of separation between church and state 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, Tocqueville traces this simmering conflict to its root—“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.” Evidently, Tocqueville’s thesis anticipates the persistence of conflict for future generations. While Tocqueville’s perspective may not supply a sufficiently comprehensive perspective for all observers, partly because he saw secularism as a distinct occurrence standing apart from its origins in developments that derived from religion itself, it is arguably true that secularism “has gained ground at the expense of its rival.” Thus, signifying the ascendancy of a lexicon dominated by such terms as individualism, tolerance, progress, neo-Darwinian atheism, and antireligious scientism.

Supplementing this analysis, Professor Steven Smith submits an examination of American religious freedom that echoes some of Tocqueville’s observation. He finds that there are two distinct stories of American religious freedom. First he explains the standard story, one that is consistent with Judge Strine’s intuitions. “The standard story... tells us how, under the influence of the Enlightenment, the American founders broke away from intolerance and dogmatism of centuries of Christendom and courageously set out on a radical new experiment in religious liberty.” Evidently this movement is valorized by the presumptive appeal of progress.
and simultaneously elevates one or more of the several explanations and descriptions of secularization.\textsuperscript{229} As this story goes, “the Founders 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.”\textsuperscript{230} And 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.\textsuperscript{231}

By contrast with the standard story of religious freedom, Professor Smith offers a revised story, one that “begins in late antiquity with emergence of a new religion—Christianity—with distinctive commitments to a separation of spiritual and temporal authority and to an inner saving religiosity that was of necessity sincere and voluntary.”\textsuperscript{232} Smith contends that “[t]hese themes, together with a commitment to openeness and contestation between perennial providentialist and secularist interpretations of the nation, constituted the distinctive American settlement of the problem of religious pluralism.”\textsuperscript{233} 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).”\textsuperscript{234}

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.\textsuperscript{235} And yet, the revised story, 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 of course was something more than we might mean today: “merely a privilege or immunity that governments may (or may not) choose to confer, or an ‘interest’ that should be assigned significant ‘weight’ in political or judicial ‘balancing.’”\textsuperscript{236} Religion, said Madison, was free in the sense that it was a domain “‘wholly exempt from [the government’s] cognizance.’”\textsuperscript{237} Madison reminds us that failure to respect this right in its jurisdictional sense signifies that all

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\item Hutchison, \textit{Metaphysical Univocity, supra} note\_\_ at 53.
\item STEVEN SMITH, \textit{supra} note\_\_ at 167.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} 167-68.
\item \textit{Id.} at 167.
\item Hutchison, \textit{Metaphysical Univocity, supra} note\_\_ at 53-54.
\item STEVEN SMITH, \textit{supra} note\_\_ at 169.
\item \textit{Id.} (quoting Madison).
\end{enumerate}
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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.\(^238\) Consistent with this instinct, “states that fail to protect religious freedom usually trample on other freedoms too.”\(^239\) If Professor Smith’s account of religious freedom and Tocqueville’s understanding of the nation’s founding is accurate, then Strine’s adamantine conception of America as a “secular” state galloping toward “social progress,” and his commitment to shrinking the power and religious liberty interests of employers by correspondingly expanding the power of the state becomes 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.\(^240\) Second, the secularists “understanding of human 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 unable to demonstrate its own presupposition that the passage from the Middle Ages to modernity was somehow inevitable, necessary, and normative.”\(^241\) Although modern elites from before and after the French Revolution,\(^242\)—and apparently the world over,\(^243\)—insist on the perfectibility of man, nature, and society,\(^244\) this

\(^{238}\) Id. at 169-70.
\(^{239}\) Rajeev Bhargava, *Rehabilitating Secularism*, in *RETHINKING SECULARISM* 99 (Craig Calhoun et al. eds., 2011).
\(^{240}\) 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.).
\(^{242}\) PATRICK J. DENEEN, *DEMOCRATIC FAITH* xii-xiv (2005) (describing the decision of the French Assembly, after the success of the French Revolution, to desacralize 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).
\(^{243}\) *Id.* at xv (discussing Chinese students who assembled a Styrofoam sculpture called the Goddess of Democracy, the apparent desacralized descendant of St. Genevieve of St. Genevieve Cathedral in France, as their only hope of salvation).
\(^{244}\) *Id.* at 4.
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.\textsuperscript{245} 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 \textit{telos}, of progress without boundary and of faith without grounding,”\textsuperscript{246} it remains doubtful that society can endure without a transcendent horizon.\textsuperscript{247}

This contention aptly applies to moderns, despite the fact that they emphasize the self-construction of identity,\textsuperscript{248} because it is equally true that there is an “unslaked craving for transcendence” that percolates within the Latin West.\textsuperscript{249} 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.\textsuperscript{250} Given the current absence of such an agreement, 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.”\textsuperscript{251} 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.”\textsuperscript{252} 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.”\textsuperscript{253}

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

\textsuperscript{245} Id. at xiv.
\textsuperscript{246} Id. at 5.
\textsuperscript{247} Brague, \textit{supra} note___ at 1-10.
\textsuperscript{248} GREGORY, \textit{supra} note___ at 292.
\textsuperscript{249} Id. at 10.
\textsuperscript{252} Id.
\textsuperscript{253} Id.
marginalized and impoverishes the nation’s discourse on social justice, claims, which are richly underscored by this article’s above-referenced analysis of both the Progressive Era and the New Deal.

If all of this true, then Strine’s contention that the United States has become a singularly secular nation is doubtful, a conclusion that is 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.” This claim is destabilized, if not contradicted, by noting that *Cantwell* stands for three additional propositions, which, taken in combination, 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 provisions. Second, commencing with *Cantwell*, during the past 50 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. 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. 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, he manages to do so without noting the linguistic parallels between *Cantwell* and *Buck v. Bell*.

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255 See supra Part II.
256 See e.g., Strine, *supra* note at 83 (accepting the notion that conduct remains subject to regulation for the protection of society (citing *Cantwell v. Connecticut*, 310 U. S. 296, 303-04 (1940))).
257 NOWAK & ROTUNDA, *supra* note at 1195.
258 Id. at 1549.
259 *Cantwell v. Connecticut*, 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 Amendment”).
261 Linguistic parallels arise because language exists in both cases suggesting the state takes precedence over the individual liberty interest of the claimants. See e.g., *Cantwell v. Connecticut*, 310 U. S. at 304 (stating that “[c]onduct remains subject to regulation for the protection of society”) and *Buck v. Bell*, 274 U. S. 200, 207 (1927) (stating “that the public welfare may call upon the best citizens for their lives”).
262 *Buck v. Bell*, 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]here generations of imbeciles are enough”). Of course it is highly unlikely that Carrie Buck was an imbecile. Hutchison, *Waging War on the “Unfit,” supra* note at 20 (citing Paul Lombardo).
or the distinctively different outcomes of the two cases on the question of individual liberty. 263 Importantly, in Cantwell, the Court invalidated the state licensing solicitation statute as construed to the plaintiffs because it deprived them of liberty without due process of law. 264 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 his justification for social progress legislation become 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 suggesting that some form of human flourishing is the only goal, 265 as part of a move that may foster support for flattening religious liberty in the future. 266

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. 267 As Professor Brague shows, the use of the term secularism in English began in the middle of the nineteenth century, 268 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. 269 A thorough understanding of history shows that the root of secular, secularism and secularity cannot escape their religious, even biblical 270 origins 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. 271

263 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 ___ at 1625. On the other hand, the Court in Buck v. Bell rejected Carrie Buck’s equal protection and due process challenge to a state sterilization decision thus allowing the state to move forward in vitiating her liberty interest. Buck v. Bell, 274 U. S. at 205.


265 See e.g., JAMES SMITH, supra note ___ at 93-94 (discussing Charles Taylor).

266 Hutchison, Metaphysical Univocity, supra note ___ at 111.

267 Brague, supra note ___ at 1.

268 Id. at 1-2.

269 Id. at 2.

270 Id.

271 Brague, supra note ___ at 7.
the modern surrender to secular neutrality.\footnote{Steven Smith, supra note \textsuperscript{272} 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 secular neutrality premised on the view that the latter phase is more enlightened and inclusive).} Strine’s views, if accepted, signify that whoever declines to take a seat at the nation’s table on the same level as all other claims and authorities, is barred from the game.\footnote{Brague, supra note \textsuperscript{273} at 7.} 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, such as Strine, appear to be dedicated to, what Steven Smith calls a pretense, one that is premised on the imagined neutrality of secular neutrality\footnote{Steven Smith, supra note \textsuperscript{274} at 138.} despite the hopelessness of attaining this goal through reason.\footnote{Hutchison, Metaphysical Univocity, supra note \textsuperscript{275} at 105.} 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/religious positions,\footnote{See, e.g., Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 75 (1995) [hereinafter, Smith, Foreordained Failure] (contesting the possibility of establishing a “neutral theory”).} and as a banner that surfaces as part of a process that seeks to advance the adoption of secular neutrality as the prevailing orthodoxy,\footnote{See Steven Smith, supra note \textsuperscript{276} 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 secular neutrality).} this effort may signify the nation’s drift toward cultural, political, and finally adjudicatory incoherence.\footnote{Hutchison, Metaphysical Univocity, supra note \textsuperscript{277} at 107.} Incoherence is deftly unmasked first by Winnifred Fallers Sullivan’s intuition that you cannot celebrate religious freedom while denying it to those whose religion you don’t like\footnote{Winnifred Fallers Sullivan, The Impossibility of Religious Freedom, Immanent Frame, SSRC (blog) (July 8, 2014, 12:33 PM), http://blogs.ssrc.org/tif/2014/07/08/impossibility-of-religious-freedom/?disp=print.} 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.”\footnote{N. T. Wright, Surprised by Hope: Rethinking Heaven, the Resurrection, and the Mission of the Church 64 (2008).}

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 propagation of democratic faith in social progress may obfuscate the religious lineage of such beliefs.\footnote{Deneen, Democratic Faith, supra note \textsuperscript{281} at 96.} 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, making compromise difficult as the political and legal culture led by Judge 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, 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 who opposed the inclusion of certain forms of contraception in their respective firms’ health insurance policies. The firms and their owners maintained that the contested contraceptive are abortifacients. 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 their religion. RFRA as amended by RLUIPA covers “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” RFRA reflects Congress’ determination to reverse Employment Division v. Smith wherein the Supreme Court declined to

\[^{282}\] STEVEN SMITH, supra note___ at 153.
\[^{283}\] Id.
\[^{284}\] Id. at 168.
\[^{285}\] Burwell v. Hobby Lobby, 134 S. Ct. at 2762.
\[^{286}\] Id. at 2765-66.
\[^{287}\] Id. at 2755.
apply the Court’s pre-existing balancing test established in Sherbert v. Verner.289 As the Smith Court noted, Sherbert held that “governmental actions that substantially burden a religious practice must be justified by a ‘compelling governmental interest’”290. 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.”291 Prompted by this development, the Hobby Lobby majority opinion held that “[n]othing in RFRA suggests a [C]ongressional intent to depart from the Dictionary Act definition of ‘person,’ which ‘include[s] corporations”292 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.293 Bringing a similar viewpoint to the table, Strine, nonetheless, concedes, 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 companies.’”294 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.”295 My reading of Strine’s analysis suggests that it is doubtful that he is content with this self-limiting proposition.296

289 Sherbert v. Verner, 374 U.S. 398 (1963) (holding that South Carolina could not apply deny unemployment benefits to a claimant who was refused employment because of her religious beliefs, which would require her to work on Saturday).
290 Smith, 494 U. S. at 873.
291 Id.
292 Burwell v. Hobby Lobby, 134 S. Ct. at 2755.
293 See e.g., See Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting petitioners, Hobby Lobby, No. 13-354 (U. S. Jan. 28, 2014) [hereinafter “Law Professors’ Brief”] at 10-16 (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 extinguishes the right of a corporation to sue to assert rights of their shareholders).
294 Strine, supra note at 93 (citing Hobby Lobby, at 134 S. Ct. at 2768).
295 Id.
296 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 is unwilling to quibble with the Green family’s assertion that contraceptives were abortifacients; (3) critiques the Court’s reliance on the administration’s affirmative grant of exemptions because it undermines the government’s compelling interest claim; (4) rejects 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) attacks the Court’s contention that a “mandate was not the least restrictive methods of providing access to
Indeed, repelled by the *Hobby Lobby* Court’s approach Strine adopts Justice Ginsburg’s dissenting claim 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 of the tab.” \(^{297}\) Strine argues that allowing corporations to exercise their religious liberty interests deprives deserving workers of a “right” to minimum essential coverage. \(^{298}\) 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. \(^{299}\) 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, corporate or otherwise, does not stand as barrier to the exercise of religious liberty. \(^{300}\)

Strine furthers his corporate law critique by underlining Berle & Means’ separation of ownership and control formulation, \(^{301}\) which unexceptionally applies to large publicly-traded firms. Explicating the separation and ownership framework, a viewpoint that resonates with a number of law professors who signed onto a *Hobby Lobby* amicus brief opposing the plaintiffs’ claims, \(^{302}\) he 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

\(^{297}\) *Id.* at 95 (quoting *Hobby Lobby*, 132 S. Ct. at 2787 (Ginsburg, J. dissenting)).

\(^{298}\) *Id.*

\(^{299}\) *Id.*


\(^{301}\) For a discussion of Berle & Means insights, see Hutchison, *Religious Liberty for Employers as Corporations*, *supra* note ___ at 16 (stressing their focus on large publicly traded firms and their failure to fully incorporate contractarian insights).

existence of the corporation when it serves their personal interest.” ³⁰³ Erected on this foundation, Strine contends the employers at issue in *Hobby Lobby* remain distinct legal entities from their owners and their owners’ beliefs, ³⁰⁴ which disqualifies the firms themselves from taking advantage of RFRA protection. 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. ³⁰⁵ 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-costs economics,”³⁰⁶ 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, ³⁰⁷ 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. ³⁰⁸ and finally, despite Justice Brennan’s observation that “by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis”³⁰⁹ 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,³¹⁰ 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 that is distinctly 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

³⁰⁴ *Id.* at 109.
³⁰⁵ *Id.*
³⁰⁷ *Id.* at 4-5 (showing that rather than reifying legal “separateness” as a dispositive attribute, the Justices, consistent with the range of choices available to an entrepreneur, ascribe 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).
³⁰⁸ *Id.*
³¹⁰ *See generally,* Buccola, *supra* note____ at 1-46 & Meese & Oman, *supra* note____ at 273-301.
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. It 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.”

Strine’s obdurate focus on the presumed tension arising out of the separation of ownership and control framework has a vanishingly 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 & Means 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, a reality that corresponds with the actual facts on the ground regarding the respective firms in *Hobby Lobby*.

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. As a result of this custom-tailored process, shareholders regularly impose their religion on corporations. In practice: (1) for-profit corporations infused with their owners’ religion are common; (2) such businesses do no violence to corporate law, which is primarily contractual and facilitative; (3) there 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. Third, there is no single model of corporate governance; and as such there is often no fundamental distinction between closely held

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311 Strine, *supra* note ___ at 108.
312 See William J. Carney, *Mergers and Acquisitions: Cases and Materials* 4 (2011, 3rd ed.) (quoting Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 *J. of Pol. Econ.*, 110 (1965) (indicating that only so long as we are unable to discern any control relationship between shareholders and management, then the Berle & Means’ separation of ownership and control framework applies)).
313 For a description of the each of the respective *Hobby Lobby* firms, shareholders, shareholders group and customized operational structure, see Hutchison, *Religious Liberty for Employers as Corporations*, *supra* note ___ at 42-44.
315 *Id.* at 279-80.
316 *Id.* at 300.
corporations and partnerships or the sole proprietorships, they imitate.317 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 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/or constitutional rights that natural persons’ possess.318 In harmony with such claims, IRS rules and regulations commonly treat many corporations as entities that are indistinguishable from sole proprietorships for tax purposes.319 Most for-profit corporations file their tax returns as “S” corporations, meaning that they elect to pass corporate income, losses, deductions and credits through to their shareholders for federal tax purposes, just like partners in a partnership,320 as the federal government declines to separate individual corporate owners of such firms from their businesses.321 Congruently with this move, Meese & 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.322 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.323 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 Judge Strine’s perspective that corporate status, standing alone, renders such firms ineligible to bring free exercise claims under RFRA.324

But of course there is more to Strine’s critique of the Hobby Lobby decision. Strine notes that the Hobby Lobby majority attempted to limit its holding to closely held firms,325 but argues (implicitly) against the importance of such a claim by stating that such firms “are not a small

317 Id. at 287.
318 Hutchison, Religious Liberty for Employers as Corporations, supra note ___ at 40.
319 Rienzi, supra note ___ at 97-98.
320 Id. at 97.
321 Id.
322 Meese & Oman, supra note ___ at 286-287.
323 Id. at 274.
324 Hobby Lobby, 134 S. Ct. at 2806 (Breyer, J. and Kagan J., dissenting).
325 Strine, supra note ___ at 97.
Returning to his parade of horribles, he proclaims that the ACA’s exemption framework has now been broadened by the Court into a much larger potential threat to the law and specifically the minimum essential coverage guaranteed to each worker by the act. 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 interest 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, when and if a firm proffers religious objections to otherwise enforceable government mandates. 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. 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. Evidently, this corporate menace, has become ever more ominous in the face of a number of disquieting circumstances.

After largely exhausting the contention that the *Hobby Lobby* case prepares the nation for a volcanic eruption of corporate power while pressurizing corporate law itself, Strine contends that the *Hobby Lobby* majority “also ignored another critical question: who can decide what the corporation’s religion is?” 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

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326 Id.
327 Id.
329 Strine, *supra* note___ at 97.
330 Id. at 98-100.
331 Id. at 100.
332 Id. at 100-104 (Strine list the following circumstances: the fact that unions putatively formed to protect workers, are in decline, the present reality that good jobs are scarce, the fear that women are placed under threat since IUDs as a form of contraception are expensive, the number of firm who engage self-described “corporate religion” is large, and finally, the fact that *Hobby Lobby* prompts further efforts by employers’ to lower costs by impinging on workers’ freedom such as requiring workers to undergo test for tobacco use or otherwise suffer consequences because of obesity).
333 Id. at 110.
perspective that finds support in Delaware’s General Corporation Law. 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.\footnote{See e.g., DGCL § 14 (a) (stating that the “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 . . .”).} An appropriate understanding of Delaware law clearly shows that these “devices obliterate any boundary between ownership and control”\footnote{Id.} enabling firms mirroring the organizational structure of the respective 
_Hobby Lobby_ entities to operate as “incorporated partnerships.”\footnote{Id. at 281.} Corporate law scholars Meese & Oman verify that “Delaware expressly empowers shareholders to use 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 among partners.’”\footnote{Id. at 285.} “No fiduciary duties or other manifestations of corporate separateness constrain such shareholders from exercising the very same ownership prerogatives as members of a partnership.”\footnote{Id.} 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.”\footnote{Id.} Shareholders who effectively act as employers of record, of “such ‘incorporated partnerships’ would still retain limited liability unlike partners, and the firms themselves would continue to enjoy entity status for transactional or other purposes, unlike the partnership they otherwise mimic.”\footnote{Id.} While Delaware law does not decide the 
_Hobby Lobby_ case, it is plain that the state’s incorporation statutes provides persuasive authority that signifies directors/shareholders may pursue objectives that eschew categorical profit maximization and fortify religious values,\footnote{See Strine supra note 110 note 274.} a move that may increase profits.\footnote{Meese & Oman, supra note 12 at 284.}

Secondly, Strine’s claim that the 
_Hobby Lobby_ Court ignored the question of who decides the respective firms’ 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

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\footnote{334 See e.g., DGCL § 14 (a) (stating that the “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 . . .”).}

\footnote{335 Id.}

\footnote{336 Id. at 281.}

\footnote{337 Id. at 285.}

\footnote{338 Id.}

\footnote{339 Id.}

\footnote{340 Id.}

\footnote{341 Id.}

\footnote{342 See Strine supra note 110 note 274.}

\footnote{343 Meese & Oman, supra note 12 at 284.}
views of the shareholder-managers counted in the Court’s analysis, but not the views of other patrons, such as employees,”344 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.345 Buccola reveals, despite its clumsy language,346 the *Hobby Lobby* Court was merely trying to locate the person to be regulated, absent the corporate form the ACA would have regarded as the “employer.”347 “[A]lthough the majority opinion declares that recognizing a free-exercise claim would protect the companies’ ‘owners and controllers,’ it does not logically follow that every corporate exercise of religion, would protect the shareholder-managers directly.”348 Within the corporate structure of each of the respective firms that made up the *Hobby Lobby* case, the controllers could be directors, shareholders or managers or all of the above.349 That said, most salient for purposes of answering Strine’s question, is the simple fact that the “regulation, at issue, in *Hobby Lobby* [arising out of the ACA itself] was a regulation of employers—in particular, employers 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.”350

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 agreements351 arising out of the entrepreneurial choice framework.352

Facilitated by entrepreneurial choice, corporations, conceptually and operationally, have the capability of running the gamut from hierarchical publicly traded firms to closely held entities that are more like partnership, membership organizations or associations of individuals.353 The implications arising from a flexible understanding of for-profit corporations and the notion that

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344 Buccola, *supra* note__ at 43.
345 *Id.*
346 *Id.* (showing that the Court inconsistently referred to “shareholders,” “owners,” and “owners and controllers” in attempting to find the persons whom, absent the corporate form, the ACA mandate applied to).
347 *Id.*
348 *Id.* (footnotes omitted).
349 Hutchison, *Religious Liberty for Employers as Corporations*, *supra* note__ at 47.
350 Buccola, *supra* note__ at 42.
351 For a description of such agreements, see Hutchison, *Religious Liberty for Employers as Corporations*, *supra* note__ at 42-44.
352 *Id.* at 47.
353 See e.g., Meese & Oman, *supra* note__ at 278-294. See also, Hutchison, *Religious Liberty For Employers as Corporations*, *supra* note__ at 5.
corporations can be variably created is congruent with the notion of human choice, one that facilitates the attainment of distinctive and diverse corporate objectives that are initiated by natural human beings arising within a society increasingly drawn to incommensurable and rivalrous values. As such, it is likely that the Supreme Court’s acceptance of the entrepreneurial choice framework that grounds itself in law and economics scholarship, one which enables closely held firms to pursue their religious autonomy interest, strengthens rather than transforms corporate law. And such a view is consistent with the claim that almost no one thinks that “American law can be truly and adequately respectful of religious freedom [] if the law offere[d] no avenue [] to accommodate deeply held, conscientious religious commitments.” If all of this is true, these conclusions combine to dispute Strine’s entrenched corporate law intuitions, 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 under stress, strengthens and reaffirms existing contractarian insights which 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 Judge 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 Judge Strine’s approach, a viewpoint that is explicitly dedicated to an expansion of the liberal regulatory state, it is advisable to reconsider briefly Professor Deneen’s scholarship. Concentrating on the assumptions, which 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.” 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.\footnote{Id.} 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,\footnote{Hutchison, \textit{Metaphysical Univocity, supra note___} at 103 (citing Alasdair MacIntyre).} 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.\footnote{Deneen, \textit{Unsustainable Liberalism, supra note___} at 2} Thus law, can be seen by liberalism’s most robust defenders as a legitimate restraint upon the external actions of individuals (employers), one that restricts the autonomous, yet potentially destructive, activity of radically separate, and rivalrous human beings who are monitored increasingly by the state.\footnote{Id. at 3.} 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.\footnote{Id.}

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 even determines legitimate and illegitimate expressions of religious belief.\footnote{Id.} 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.\footnote{Id. at 3.} 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.\footnote{Id. at 2.} Erected on this descriptive framework, human...
beings are viewed, by nature as “non-relational” creatures, separate and autonomous, a claim that is consistent with the deduction that liberalism is increasingly subject to the criterion of choice.\(^{365}\) That is, liberalism, expansively conceived, asks whether a given relationship has been chosen upon the basis of its service to rational self-interest.\(^{366}\) 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.\(^{367}\) Against 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.\(^{368}\) “Yet implicitly it was constituted as a constructive or normative project.”\(^{369}\) 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\(^{370}\) 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,\(^{371}\) liberal theory sought to educate people to think differently about themselves and their relationships.\(^{372}\) 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,”\(^{373}\) an outcome that is further complicated because modern man is waiting but does not know what he is waiting for.\(^{374}\)

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,

\(^{365}\) Id.
\(^{366}\) Id.
\(^{367}\) Id. at 4.
\(^{368}\) Id.
\(^{369}\) Id.
\(^{370}\) Id.
\(^{371}\) BRAD S. GREGORY, THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY 11 (2012) (referencing Alasdair MacIntyre) (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).
\(^{372}\) Deneen, Unsustainable Liberalism, supra note ___ at 4-5.
\(^{373}\) Id.
\(^{374}\) See CHANTAL DELSOL, ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD xxvii (Robin Dick trans., 2003).
to neighborhood, to nation, to family and to religion.\textsuperscript{375} 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 correlatively, 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.\textsuperscript{376} 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.\textsuperscript{377}

Equally plain, it corresponds with a second move. “The second revolution and the second anthropological assumption that constitutes liberalism, is less visibly political”\textsuperscript{378} 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.\textsuperscript{379} And yet, the consumerist market model of culture, predicated “on a widely embraced Romantic and Post-Romantic conception of the individual,”\textsuperscript{380} 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.\textsuperscript{381} As Brad Gregory shows, within the context of the Latin West, the market eventually “displaced confessional churches as the junior partner alongside states in the public exercise of power”\textsuperscript{382} 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.\textsuperscript{383} Consistent with these contentions, Justice Ginsburg’s \textit{Hobby Lobby}

\textsuperscript{375} Deneen, \textit{Unsustainable Liberalism}, supra note \_ at 4-5.
\textsuperscript{377} Hutchison, \textit{Metaphysical Univocity}, supra note \_ at 111.
\textsuperscript{378} Deneen, \textit{Unsustainable Liberalism}, supra note \_ at 5.
\textsuperscript{379} \textit{Id.} at 6.
\textsuperscript{380} GREGORY, supra note \_ at 11 (referencing Alastair MacIntyre).
\textsuperscript{381} HUNTER, \textit{To Change the World} supra note \_ at 30.
\textsuperscript{382} GREGORY, supra note \_ at 283.
\textsuperscript{383} \textit{Id.} at 284.
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,\(^{384}\) while the Obama administration calculates that ISIS-inspired savagery can be thwarted by providing young Muslim men with expanded employment options.\(^{385}\)

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.\(^{386}\) 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.\(^{387}\) In essence, consistent with John Gray’s deductions, liberalism has become manifestly post-liberal\(^ {388}\) 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,\(^ {389}\) richly fortified by an unaccountable bureaucracy,\(^ {390}\) corresponds with the above-referenced rejection of the of *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

\(^{384}\) *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2788 (Ginsburg, J. dissenting).

\(^{385}\) R. R. Reno, *While We’re at It*, FIRST THINGS, April 2015, at 65, 65.

\(^{386}\) *See e.g.*, Deneen, *The Power Elite*, supra note ___ at 2-4(discussing how today’s corporate ideology offered by power elites have 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 . . .”).

\(^{387}\) *Id.*

\(^{388}\) *See generally*, GRAY, POST-LIBERALISM, supra note ___ at 10-12.

\(^{389}\) Deneen, *The Power Elite*, supra note ___ at 3.

\(^{390}\) *See e.g.*, JAY SEKULOW, UNDEMONCRATIC: 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).
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 telos, 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 are all 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. 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,” 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 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, 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. 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

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391 Deneen, *Unsustainable Liberalism*, supra note ___ at 5.
392 Id. at 8.
393 GREGORY, supra note ___ at 292.
395 GREGORY, supra note ___ at 286.
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’ devotion to choice. This devotion may be enforced by the exercise of state power. This is so 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.396 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 Judge Strine and Justice Ginsburg prefer to deploy the apparatus of the state in order to 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, which may be the source of the problem in the first place.

396 See e.g., Meese & Oman, supra note ___ at 277-294 (discussing contractarianism and the existence of enabling legislation).
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 solipsism have waxed and self-control, community, and self-reliance have waned, thus nurturing a nation of narcissists who are incapable of controlling their own impulses and desires. 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 unions all compete to drain the public trough. This yields a rather immodestly adorned nation wherein boundless self-maximizing appetites spur unlimited government, an outcome that implies that both the government and its people are in grave need of additional clothing. Since the rise in the size and scope of government reflects the fact that “State has permeated civil society to such an extent that the two are mostly indistinguishable,” the odds of escaping conflicts between religious groups and individuals on one hand and the state on the other are virtually nonexistent. And conflict arguably intensifies because, government decisionmakers, just like corporate ones suffer from bounded rationality.

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 protection from the uncertainty that arises from the vagaries of life in our increasingly

397 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).
399 Id. (providing a comprehensive demonstration that within the culture, the prevailing view is that only what we do here and now matters).
400 Id.
401 Hutchison, Lochner, Liberty of Contract, supra note ___ at 424.
403 Hunter, To Change the World supra note ___ at 154.
404 Hutchison, Metaphysical Univocity, supra note ___ at 72.
405 See e.g., Bainbridge, Nexus of Contracts, supra note ___ at 3 (citing Herbert Simon and Roy Radner).
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 contributes to loneliness, which intensifies the expansion of the state. Robert Nisbet intuits:

[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.

Third, the ongoing attempt to ensure employee freedom, autonomy and ever-expanding economic advancement, a process that liberalism itself and Judge 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 Nietzsche’s example, which is signaled by the will to

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not-to-do-social-justice.html (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).  


408 Sisk, supra note 105, at 1.  

use power without moral restraint.\textsuperscript{410} 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: solipsism.\textsuperscript{411} 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.\textsuperscript{412} 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.\textsuperscript{413}

Yet quite a different response is possible. Patrick 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 answers to liberalism.\textsuperscript{414} This is so because “conservatism” is itself a species of liberalism.\textsuperscript{415} 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.\textsuperscript{416} 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.\textsuperscript{417} While he admits that the Constitution consolidated a number of political activities in the center, it left considerable room for local entities.\textsuperscript{418} Hence, “[t]he return to a more robust form of federalism would allow for greater local autonomy in

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\item Hutchison, \textit{Waging War on the “Unfit,”} supra note\textsuperscript{___} at 21.
\item \textit{Id.} at 485-488.
\item Deneen, \textit{Unsustainable Liberalism,} supra note\textsuperscript{___} at 10.
\item \textit{Id.} at 11.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 12.
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establishing and cultivating local forms of culture and self-governance”\textsuperscript{419} within limits that would exclude egregious constraints upon human liberty.\textsuperscript{420} This would provide space for localized, even authoritative norm-shaping institutions to flourish\textsuperscript{421} and battle the tyranny of the majority\textsuperscript{422} 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\textsuperscript{423} 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 genuine cultivation of local cultures while shrinking, if not eliminating liberalism’s self-contradictory impulse borne of its twin depletions of moral and material reservoirs.\textsuperscript{424} To do otherwise risks “an oscillation between growing anarchy and likely martial imposition of order by an increasingly desperate state,”\textsuperscript{425} something Judge 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 \textit{A Job is Not a Hobby}, despite its contradictions, remains a worthwhile enterprise.

\section*{VI. Conclusion}

This article establishes that Judge Strine’s approach is riven 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.\textsuperscript{426} Neither has Strine delineated an adequate understanding of secularity’s contested origins\textsuperscript{427} 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

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\bibitem{419} Id.
\bibitem{420} Id. at 13.
\bibitem{421} Id.
\bibitem{422} \textsc{Toqueville}, supra note___ at 181 (Vol. I, Part II, Chpt. 4).
\bibitem{423} Deneen, \textit{Unsustainable Liberalism}, supra note___ at 13.
\bibitem{424} Id.
\bibitem{425} Id.
\bibitem{426} \textsc{William T. Cavanaugh}, \textit{The Myth of Religious Violence} 4 (2009).
\bibitem{427} On philosopher Charles Taylor’s account, there are three types of secularity, which for ease of description can be denoted through the use of subscripts as secularity\textsubscript{1}, secularity\textsubscript{2}, and secularity\textsubscript{3}. \textit{See} James Smith, supra note___ at 20.
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to value-pluralism reflected in different traditions and different religious views on moneymaking,\(^{428}\) 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.\(^{429}\) 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.\(^{430}\)

\(^{428}\) Rienzi, supra note ___ at 60.

\(^{429}\) See e.g., Emp’t Div., Dept. of Human Res. of Or. v. Smith, 496 U.S. 913 (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).

\(^{430}\) Deneen, Unsustainable Liberalism, supra note ___ at 1-14.