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POPULIZING RELIGIOUS LIBERTY AND HOBBY LOBBY

ERICK G. KAARDAL

BACKGROUND

Today, very few attorneys in the United States receive any training in philosophy prior to obtaining their law degree. Philosophy is not a requirement in American law schools. The few law school graduates that have training in philosophy have sought it out. The absence of philosophy requirements in our law schools have resulted in law school graduates suffering from relatively narrow minds. The students arrive at law school self-expressive, but leave indoctrinated in modernist ways. It is as if law school was meant to narrow their minds, not broaden them.

Without a grounding in the philosophy of law, the law school graduates become naïve true believers in the modern legal process. This process, from my postmodern neopopulist perspective, is a raft of naïveté about what the law and the rule of law really is, practically speaking.

However, even if the law schools were to require philosophy, American law schools would likely teach bad philosophy based on a classically western Platonic-Aristotelian theory of meaning and knowledge in which words refer to absolute meanings transcending the “misuse” of human language. Knowledge is rooted, in turn, in these absolute meanings. Plato thought that words were invented to refer to absolute meanings intuited by experts – the philosopher kings.1 Aristotle thought that only experience (induction) could reveal these absolute essences to us, but that they were objective and that, again, words are invented to refer to them.2 Plato asked us to believe in philosophical experts.3 Aristotle asked us to believe in scientific experts.4 Both kinds of experts could in principle have an

3. PLATO, supra note 1.
4. ARISTOTLE, supra note 2.
absolutely private grasp of what words were actually invented to refer to. And this kind of knowledge is the foundation of all other knowledge. Expert knowledge, supposedly, has no dependence upon the use words are put to democratically. The people can be all wrong. The private language, which is what the language of contemporary science often verges on as a purported description of Reality, is supposedly more truthful than ordinary language. This principle literally defines modernity.

These days, philosophically naïve jurists – those who do not have a clue about the postmodern philosophical revolution which rejects the modern and classical referential theories of linguistic meaning – still ask us to believe that the positive law, the static text of statutes and constitutions, has an absolute referential meaning. This is what, again, makes judges experts; the philosopher kings who supposedly know what the law really is, what the positive law really means. Implicit to this view of judicial Reality is that judges know in part because they are proficient at imposing coherence on the text of the law after pinning down the absolute meaning of a few key terms, if not many key terms.

This kind of referentialism is not just a classical view of meaning, knowledge, and expertise, it is also the modern, Enlightenment view of all truly rational language about justice. It is part and parcel of modern “objectivism.” John Locke, among many others, believed that universal reason, leads to universal principles of justice. That reason is rooted in what is often called “contract” theories of justice – a clear reference to the cornerstone of republican law.

But if this classical and modern tradition about meaning and knowledge is true, then why is it that judges issue such diverse opinions about the meaning of the positive law? Why do they exhibit such radically different versions of judicial reason? Why do they have such different views of justice and therefore such different interpretations of the positive law where these interpretations are based, in the first place, on the assumption that the law is just? In order to prove that the statute or the constitution is already just, they turn it to their presumably just end.

Perhaps we need to consider the possibility that the static text of the law is not in itself either just or unjust, but just static text, subject, as a matter of practical fact, not just to interpretation, but radical interpretation. In order to keep it just, or make it just in the first place, judges understand implicitly that they must impose a concept of justice, rooted in an entire tradition, an entire view of Reality, upon it.

Now lest I alienate conservatives too early in my thought to get them to

5. See John Locke, Essay Concerning Human Understanding (The Open Court Publ’g Co. 1920).
travel with me for a while down this postmodern road, let me assure you that I am not a radical relativist. Neither is Notre Dame philosopher Alasdair MacIntyre from whom I have taken a large part of my postmodern theory of linguistic meaning and knowledge.6

I believe that the use of language, where the meaning of it is its use, is entirely tradition-bound. But this does not mean that a particular tradition is not absolutely true. In other words, like conservatives, I believe in the immutability of human nature. I am not looking for some new fantastic form of human consciousness like contemporary liberals and ideological scientists. Among all of the rival traditions in this world, including liberalism and conservatism, the use of language in one or another may be much more practical, much healthier morally speaking.

Indeed, I believe that the Christian revelation was simply God’s way of taking over ordinary language and that secular experts ever since have been trying to destroy ordinary language for this infection. Ever since the Christian revelation we have had language with which to express our humanity, our existential predicament, and its solutions much better than we could before. Christian language is quintessentially practical language, truly moral language.

Now, the word “tradition,” per my understanding of MacIntyre, is an agreement among people to use language in a certain way to describe human experience which is universal.7 That is: groups of people use language differently to describe the same human experience we are all experiencing.

This use of the word “tradition” explains well the disagreement about the recent ISIS beheading of the Egyptian Copts on the beach in Libya.8 The Egyptian Copts, per their tradition, consider the victims’ martyrs to the Coptic faith.9 ISIS, per their tradition, do not consider the victims as martyrs because they were not Muslims and the killings were just.10

One important word used when comparing traditions is their

“commensurability.” Two or more traditions can have different degrees of commensurability. ISIS and Copts appear to be completely incommensurate in light of the beheadings. Similar commensurability analysis could be applied to ideologies, cultures, academics and viewpoints – anywhere where there is a different use of language. For example, the traditions of Republicans and Democrats in 1860 (or even today) could be viewed as wildly incommensurate.

Finally, the consideration of traditions and their incommensurability leads to discussion of the government and its role vis-à-vis the people. Governments do develop a tradition, an agreement among government officials and employees on how to use language in a certain way as to human experience. That government tradition can be commensurate with the people’s tradition, or it can be incommensurate.

Because a government’s tradition can be incommensurate with the people’s tradition, particular attention is needed to show how a tradition becomes dominant culturally, politically or both. Of particular importance is the question of just revolution – a topic visited by the founders of the United States over two centuries ago. At that time, the Founders deemed the government’s tradition incommensurate with the people’s tradition – and fought the Revolutionary War because they meant it. Understanding traditions and degrees of incommensurability was the essential building block for the founding of the United States.

Importantly, MacIntyre does not think that the tradition-bound nature of all human thought and action is a problem looking for a solution.11 And of course neither do I. In fact it is the solution – the solution to liberalism. MacIntyre is saying: stop being a liberal. Stop trying to live in between, outside of, above all tradition. This is a phony, inauthentic way of life.12 Liberalism is just a rival tradition hawking the myth of universal standards of rational justification generating universal principles of justice. It is the most inauthentic tradition of all for pretending to be more than a rival tradition. MacIntyre mentions many philosophically sophisticated liberal theorists who have finally admitted that liberalism is just a competing tradition because of the absence of universal standards of rational justification.13 This includes Richard Rorty who is, of course, a pragmatist – as I am.

Basically, liberalism has expired and is all but interred. And this will lead to the total deconstruction of the modern legal system – eventually.

11. MacIntyre, supra note 6.
12. I think Professor John Kekes is saying much the same thing. See John Kekes, Against Liberalism (Cornell Univ. Press, 1997).
The way I view my job is to hasten its demise.

Now, we return to law school graduates. Law school graduates find themselves in this passé modern world assuming that the language of the law is referential, and in that sense, absolute. We implicitly teach them to fight in their briefs and in their oral arguments for meanings for words as if these meanings are, or should be, absolute. But if anything is absolutely clear to anyone who examines their experience, especially their legal experience, even briefly, it is that people, and especially lawyers, use language any damn way they please. It is all a war of words—manipulation on a grand, institutional scale. It is not actually a rational, “objective” process in which opinions (which are so often complex, and ultimately based upon the judge’s whole view of Reality) can be verified or even falsified by the text of the positive law.

Our practical reality is that the rule of law is the rule of a dominant tradition. This is the tradition, the view of Reality, in terms of which the positive law, like our U.S. Constitution, is typically interpreted. Conservatives have been screaming out my thesis without understanding what they are saying: the Constitution has been subverted to the liberal view of Reality which has its own peculiar account of reason and justice. That is correct.

The rule of law is nothing more and, mind you, nothing less, than a dominant tradition about the nature of moral reason and justice, applied to a very plastic body of legal text, which can often be deconstructed because of its conflicts and inconsistency. That is, the static text of the positive law, presents competing, rival traditions with plenty of opportunity to make that text coherent in competing, incommensurate ways.

Postmodern philosophy teaches us that the meanings of words are determined by their use. Or rather, the meaning of language is quite literally identical with its use. Language is a tool. It is a practical affair, which serves the goals of preachers, politicians, judges and lawyers, in context. In this case, educating law students would involve teaching them that words are in fact weapons, which is what their experience will teach them anyway.

Practicing law without postmodern philosophical sophistication leaves law school graduates as neophytes, blindly groping for the supposedly objective legal principles of justice. Now remember, I am not actually saying that there are not absolute principles of justice from God’s point of view. I am saying that this content, these principles, are inseparable from our account of legal reason as a whole, and therefore, from an entire tradition. One tradition may be absolutely true. But the search is not going to be based on universal standards of rational justification. There are none. There is only a pragmatic test for truth. First of all, our view of justice will tend to be one which gets us what we want. That will lead us to suspect it is
true. But then, we will also find out whether what we want is really what we ought to want. This is actually a universal human experience, not the application of some purely logical standard of truth.

The postmodern lawyer sees justice in context, as inevitably part of a tradition imposed by a judge who is expressing solidarity with his group. He will never admit this, and this is a large part of the tragedy, the bad faith, of the modern legal tradition. This dishonesty, Nietzsche and Christians would agree, is quite childish. A proper philosophical grounding aids in avoiding both this tiresome dishonesty and tactical legal errors.

This is not to suggest that victory is always the goal. This is just more naïveté. My clients have many legal goals, only a fraction of which is a totally favorable judgment. Sometimes we know this is unlikely, and we proceed in order to achieve other goals. One of those goals is to prove our postmodern point about the tradition – relative nature of justice, about the rule of law as the tradition of the judge.

This in turn, demonstrates the need to elect our judges in order to avoid being ruled by people who think that they are experts, not about some harmless technical reality, but Reality itself – what is good and just. One of our goals is the harassment of the modern legal system. My cases, taken as a whole, are a powerful form of civil disobedience. I take cases that I know will result in radical decisions, which the common man will find ridiculous if not absurd. This is a primary method for discrediting the bench’s reasoning – and the bench – in the eyes of the people. And, that is the beginning of the end of “elitist” and “expert” judges “objectively” determining the people’s tradition.

For centuries, the Roman Catholic Church has required its seminarians to study philosophy before theology as many theological errors begin as rationalist philosophical errors. Similarly, law students should receive proper philosophical training because the basic legal error starts out as the rationalist philosophical error. Requiring law students to study philosophy, and postmodern philosophy in particular, will result in much less confusion and frustration about the practical nature of the law and the legal process. A more interesting, if not altogether brighter future for the whole legal system, requires an increasing number of philosophically sophisticated attorneys pressuring every judge to recognize the democratic intention of the law or be discredited as an elitist and expert tyrant.

Of course, the very best way to assert the most legitimate purpose of the law is to let the people vote for their judges. In the meantime the best way to avoid both philosophical and legal error is to understand that justice is established on the basis of some rival tradition, no matter how temporary its seat. In that case, the dominant tradition on any bench ought to be the tradition of the people, of the democracy – yes, of the majority.
In a nutshell, all lawyers and judges have a tradition to fight for and ought to admit it. They should respect the right of the people to review them for what they really are. But more specifically, judges and lawyers who really respect the law, who embrace the democratic tradition as such, embrace its origins in ordinary language, just as good science understands that it originates in ordinary language, and therefore, does not make claims about Reality which go beyond it.

Most judges today are enemies of the democratic tradition – the democratic theory of linguistic meaning, reason, knowledge and justice. They are purebred elitists and experts. But, their time is running out. They are being overtaken by the postmodern age in which their image is not sophisticated and compelling, but naïve, irrational and tyrannical.

The modern judge habitually defends expert, agency interpretations of the law. We need judges and lawyers who respect the democratic, ordinary language of the law; anti-experts who do not make claims which go beyond it; who do not attempt to transform it into their own private, expert language supporting their private, expert understanding of justice.

Legal error exists in the failure to understand and support the democratic tradition, the ordinary language of the law. Its meaning is deeply infected by ordinary language. Expert, manipulative transformations of that language into expert language is abhorrent; it is an unforgivable sin – the blasphemy of the democratic spirit. And this is happening every day in our elitist, expert driven, modern legal system.

It is from this view that a firm grounding in postmodern philosophy will lead to better lawyers, better claims, better judges and eventually a better judicial system.

The American judicial system essentially clings to a discredited philosophy based on a Platonic-Aristotelian view of meaning, reason and knowledge. This philosophy asserts that words have meanings which transcend human language – the constantly evolving use of terms. From this point of view, the courts are constantly presenting to the public the one true meaning of “justice” – inclusive of derivative principles such as equality, rights, freedom and liberty. In each successive case, the justices present the universal meaning of justice as applied to the facts of that case.

The Platonic-Aristotelian philosophical method serves many political needs of the Court: promoting judicial objectivity and coherence and marketing judicial expertise. The Court operates practically to ensure its existence as a co-equal third branch of government, to ensure adequate funding and to obtain voluntary compliance with its opinions.

Specifically, how does the Platonic-Aristotelian philosophical method work to support the Court’s political purposes? Let us consider the U.S. Supreme Court regularly petitioning Congress for funding. To obtain the
funding, the Court promotes its judicial objectivity and coherence and markets the need for judicial expertise. The Court's promotion of judicial objectivity and its coherence makes the Court appear different than the executive and legislative branches: transcendent of politics, non-political and non-partisan.

Basically, the Court argues that Congress should fund the Court because it is different than the other political branches. The Court argues that it is the only source of objective justice among all of the government's institutions. But of course, the only real source of relatively objective justice is the democratic tradition which includes a whole view of Reality (including the nature of reason and justice) made dominant by a people which is not tyrannized by its own government, but by its own courts.

Similarly, the Court's marketing of the need for judicial expertise is self-serving. The argument is that Congress should fund the Court because we need nine justices, nine judicial experts, to tell us what justice is as the object of the written law. When Congress agrees, Congress funds the Court because Congress is convinced judicial expertise is required.

In contrast, in states with judicial elections, the political situation is different. There, the courts do not promote the myths of judicial objectivity and judicial expertise in the same way because those myths are inconsistent with judicial elections. Judicial elections exist so judges will be forced to apply the law by the light of the people's dominant tradition. There is nothing in this to apologize for. Judicial elections are postmodern realism. The judicial branch is political, not objective nor bipartisan. State courts, unlike the U.S. Supreme Court, seek funding while acknowledging what they are: a politically selected tradition concerning the nature of Reality, the good, the rational, the just.

POPULIZING PLATONIC-ARISTOTELIAN WORDS AND PHRASES

Neopopulist philosophy, as a practical understanding of language, has a few simple rules. A word's meaning is determined by its use. All language is public; there are no private languages. Ordinary words are preferred over technical words. Disputes about language should be resolved democratically, not through judicial coercion. Importantly, a language tradition is created when a group of people agree to use language in a specific way to describe human experience which is subjectively universal, rooted in the same moral dispositions. For example, the word "marriage"

14. A private language is impossible for reasons which are subtle but available in the Philosophical Investigations of Ludwig Wittgenstein, the favorite postmodern philosopher of the neopopulist movement. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (John Wiley & Sons, 2010).
has different meanings because different language traditions define “marriage” differently. For some, “friends” can be used as “friends with benefits”; others in a different language tradition would object. Another example is Republican Party of Minnesota v. White, where the U.S. Supreme Court split on application of the First Amendment to judicial candidates based on a disagreement whether a “judicial election” is an “election” where candidates would have First Amendment rights. And, the same can be said for any legal word where there is a dispute about the word’s meaning. Justice, equality, freedom and liberty are examples of terms where different language traditions offer competing definitions.

The Platonic-Aristotelian philosophy, on the other hand, is not practical and inclusive. In areas of dispute such as over the word “marriage,” the phrase “friends with benefits” or “judicial elections,” this method claims that a transcendent definition of the word or phrase exists. In other words, a true meaning exists to the word “marriage” or the phrases “friends with benefits” or “judicial elections.” The goal of the Platonic-Aristotelian philosophy is to search for the transcendent definition of the word or phrase. Since the search may be difficult, elites and experts are required to lead the way. Judges are our chief linguistic experts and culture makers in the modern tradition. They hold sway over the language of the law without democratic management. They manage the democracy. The democracy does not manage them.

There is nothing in common between the Platonic-Aristotelian philosophy and the postmodern, neopopulist understanding of language. Where neopopulists point out that rival traditions compete to control the use, and therefore the meaning, of words such as “marriage,” the Platonic-Aristotelian philosopher denies that view, seeing the “competition” as a search for the true meaning of marriage in the Reality-of-the-law, if not in Reality itself.

These different philosophical approaches result in different approaches to democracy and republicanism. Neopopulism embraces competing pluralistic language traditions and sees democracy as a necessary resolution. Platonic-Aristotelian philosophy embraces the vague notions of the republic and a merely supporting role for democracy, while insisting on experts and elites to discern the true meaning of its principles to be lived by.

Neopopulism opposes democracy to rule-by-expert. This is because every expert opinion is not simply technical, but very often caught up in a whole view of Reality – in a view of what is good and just and rational. Expert judgments which must insist on some goal, like those made every day in the Environmental Protection Agency and other federal agencies, are

also insisting on the goodness of that goal. And that judgment of goodness in turn can only be justified as the implication of many more propositions about the nature of Reality.

Accordingly, the role of the judge is very different for neopopulists and the Platonic-Aristotelians. The neopopulist judge is strictly interpreting laws to ensure that the democratic system is a fair arbiter of disputes between competing traditions. The Platonic-Aristotelian judge is attempting to find the supposedly true, transcendental meaning of the law that is in dispute in order to ensure the stability and order with which he exercises personal solidarity. After all, he is a judge. He is supposed to exercise solidarity with THE TRUTH.

In this article, the term “populize” is introduced to highlight the distinction between neopopulist philosophy and Platonic-Aristotelian philosophy. “Populizing” challenges the Platonic-Aristotelian transcendental view of Reality by noticing that there are at least two groups of people who have made linguistic agreements which cast different meanings on words being used in context.

Our way of deconstructing the rationalist pretense in the legal arena is to populize the use of any key term at issue. We insist that the judge take ordinary language seriously, the ordinary use of the term, and thereby respect the democracy, leaving his own vanity behind. His failure to populize the text of the positive law (his technical account of the language of the law serving his relative tradition) discredits him in the eyes of the people because it violates the people’s tradition – as expressed in the law itself. This is how we commit revolution.

Here are three familiar examples. First, the Platonic-Aristotelians state that the word “marriage” has one true, transcendental meaning. The neopopulist populizes “marriage” by pointing out that there are two groups, Christians and gay rights supporters, who give contradictory definitions to the word “marriage.” There is no true, transcendental meaning to the word “marriage.” Second, the Platonic-Aristotelians state that the phrase “friends with benefits” has one true, transcendental meaning. The neopopulist populizes “friends with benefits” by pointing out that there is a group of people who would agree with this use of the phrase “friends with benefits” and others who would disagree with this use of the phrase “friends with benefits.” There is no true, transcendental meaning to the phrase “friends with benefits.” Third, the Platonic-Aristotelians state in the Republican Party of Minnesota v. White dissent written by Justice Ginsberg that the phrase “judicial elections” has one true, transcendental meaning which is different than “legislative elections.”16 The neopopulist populizes “judicial

elections” by pointing out that there is a group of people who believe “judicial elections” are “elections” and another group of people who believe that “judicial elections” are not “elections.” There is no true, transcendental meaning to the phrase “judicial elections.”

**POPULIZING RELIGIOUS LIBERTY – HOBBY LOBBY**

The critical legal issue in the U.S. Supreme Court opinion in *Hobby Lobby*¹⁷ is whether a for-profit business company’s exercise of religion is covered by the Religious Freedom Restoration Act. The Court’s opinions have Platonic-Aristotelian philosophical aspects.

As a preliminary matter, the justices agree that Hobby Lobby’s owners were religious people:

Hobby Lobby’s statement of purpose commits the Greens to “[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.” App. in No. 13–354, pp. 134–135 (complaint). Each family member has signed a pledge to run the businesses in accordance with the family’s religious beliefs and to use the family assets to support Christian ministries. 723 F.3d, at 1122. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. *Id.*, at 1122; App. in No. 13–354, at 136–137. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to “know Jesus as Lord and Savior.”¹⁸

The majority and dissenting opinions differed on one issue that illuminates the Platonic-Aristotelian philosophy. Can a corporation exercise religion protectable under the Religious Freedom Restoration Act? If this question were asked on the street, many different answers would be provided because the words in the question have so many different meanings and uses. They are used in many different contexts, in many different language games. The legal opinions work to persuade by appealing to an implicit Platonic-Aristotelian view of linguistic meaning. Each opinion works to convince the reader that their interpretation of the words is *absolutely* correct.

First, the majority opinion states that the owners’ religion caused Hobby Lobby to engage in an exercise of religion which was covered by the

¹⁸. *Id.* at 2766.
Religious Freedom Restoration Act (RFRA). The majority opinion shows Platonic-Aristotelian philosophy as it expresses that the corporation is exercising religion regardless of its corporate form and profit motive.

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel, focuses not on the statutory term “person,” but on the phrase “exercise of religion.” According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.

Is it because of the corporate form? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious “autonomy... often furthers individual religious freedom as well.” Post, at 2794 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (Brennan, J., concurring in judgment)). But this principle applies equally to for-profit corporations: Furthering their religious freedom also “furthers individual religious freedom.” In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns.

If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563, we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims. As the Court explained in a later case, the “exercise of religion” involves “not only belief and profession but the performance of (or abstention from) physical acts” that are “engaged in for religious reasons.” *Smith*, 494 U.S., at 877, 110 S.Ct. 1595. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that “operates so as to make the practice of... religious beliefs more expensive” in the context of business activities imposes a burden on the exercise of religion. *Braunfeld*, supra, at 605, 81 S.Ct. 1144; see *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (recognizing that “compulsory participation in the social security system interferes with [Amish employers’] free exercise rights”).
If, as Braunfeld recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can’t Hobby Lobby, Conestoga, and Mardel do the same?¹⁹

But, the dissenting opinion disagrees. A corporation cannot exercise religion because it is a corporation and because it has a profit motive. But why would this use of the word “religion”, this dogmatic assertion of the incompatibility of religion, incorporation, and profit, be any more authoritative than the ordinary use of it implicitly defended in the decision above (despite the lack of an explicitly postmodern analysis)? It could only be more authoritative from an expert point of view where the left-leaning “experts” hereabouts are attempting to accumulate a coherent body of common law which constrains the use of the term “religion” to their relative, tradition-bound goals – to their completely relative existential motivations. There is no attempt here to understand the term democratically. The dissenting opinion states that a corporation cannot exercise religion:

The First Amendment’s free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations. “For many individuals, religious activity derives meaning in large measure from participation in a larger religious community,” and “furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.” Corporation of Presiding Bishop of Church of Jesus Christ of Latter–day Saints v. Amos, 483 U.S. 327, 342, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (Brennan, J., concurring in judgment). The Court’s “special solicitude to the rights of religious organizations,” Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. ——, ——, 132 S.Ct. 694, 706, 181 L.Ed.2d 650 (2012), however, is just that. No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in “the commercial, profit-making world.” Amos, 483 U.S., at 337, 107 S.Ct. 2862.

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. See 42 U.S.C.

¹⁹. Id. at 2769-70.
§§ 2000e(b), 2000e-1(a), 2000e-2(a); cf. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 80–81, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977) (Title VII requires reasonable accommodation of an employee’s religious exercise, but such accommodation must not come “at the expense of other[ employees]”). The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court’s attention. One can only wonder why the Court shuts this key difference from sight.20

From the neopopulist philosophical view, both opinions are engaged in Platonic-Aristotelian philosophy. Fortunately, there is an implicit respect for the democratic use of the term “religion” in the majority’s opinion, but without the sophisticated explicit, postmodern analysis we long for as the source of good faith and a much more interesting and relevant legal process. The majority opinion states what a corporation is transcendentally – an organization of people – and then states that it can exercise religion. The dissenting opinion states what a corporation is transcendentally – a for-profit company – and then states that it cannot exercise religion. The common parishioner just knows very well that a business can have a religious culture.

As a neopopulist, I understand that the opinions are not actually dialoguing with each other. They are incommensurate uses of language. They are rival traditions – one secular, one religious. Sound familiar? Yes, the issue of “corporations exercising religion” is much the same as “marriage,” “friends with benefits” and “judicial elections.”

According to neopopulist philosophy, the Platonic-Aristotelian philosophy leads only to an appearance of a dialogue, an appearance of shared legal reason, relating to how religious liberty applies to the facts. But, since there is no disagreement about the facts (except the facts about religion, whether it has attribute x or y, or not x, and so on), the real disagreement among the justices is actually traditional, paradigmatic. It is a disagreement about whether or not it is a fact that religion is like this or like that. It is an amazingly blatant disagreement about the nature of Reality, a very important part of Reality. It is a fundamental disagreement about what religion is – its range and reach in the human experience.

It is not surprising that secularists incommensurately think that religion can, and should be, compartmentalized. This is consonant with their goals. The opinion does not address religious liberty. It addresses the nature of religion in itself, and in doing so, appeals implicitly to many propositions about the true nature of man and his enterprises – the extent to which it is

20. Id. at 2794-95.
all morally integrated by nature. This is metaphysics. There is no moral and religious theory without metaphysics. From a democratic point of view, the dissenting opinion is anti-democratic bad faith—literally immoral.

At best, the dissenting opinion is philosophically sophomoric. The common parishioner knows that God expects allegiance in every part of his life; there is no compartmentalization of religious faith as such. The imposition of the minority view would be blatant tyranny, a clear violation of the First Amendment from a democratic point of view.

So, even Supreme Court justices can be tragically unsophisticated in their lack of philosophical self-consciousness. It is all philosophy. It is all just a dispute between traditions, and therefore, between paradigms of language. It is all about competing language games. The most unsophisticated symptom of all is that the Court minority does not care to become more conscious. It knows little more than the grip of expert power exercised on behalf of goals, which are entirely relative. In their condescension to democracy, judges become the most self-deluded characters on the modern stage.

Of course, the time of modern “reason” is waning. The postmodern age is in hot pursuit. And like a wolf, its indifference to the judiciary’s modern understanding of themselves and their role will shock them, and frighten them, to their rationalist core.