RELIGIOUS FREEDOM AND ITS ENEMIES, OR WHY THE *SMITH* DECISION MAY BE A GREATER LOSS NOW THAN IT WAS THEN

Steven D. Smith[*]

The invitation to this Symposium instructed participants to write "shorter, provocative essays" as opposed to "traditional law review articles." Dutiful fellow that I am, I have accordingly resolved not to limit myself to cautious, easily footnotable assertions after the manner of respectable legal scholarship (though there will be *some* of those). Instead (and painful though such deviancy has been), I have indulged in assuming, generalizing, and flagrant speculating, with the hope of mustering up something that may provoke.

I. RELIGIOUS FREEDOM AS A VALUABLE RIGHT

First, the assuming. In this Essay, I will assume that religious freedom is a good thing. By religious freedom I mean, basically, the legally recognized and protected right of people to believe, worship, and live in accordance with their religious faith, subject only to the overriding needs of social order. My assumption that this kind of freedom is a good thing may not seem especially provocative; on the contrary, it may seem pretty much platitudinous. I do not believe the assumption is as platitudinous, or as secure, as some may think,[1] and the assumption may come to seem less congenial as the Essay proceeds. In any case, for present purposes I am not going to argue for the assumption but am merely going to acknowledge that I am making it.

I will add that a constitutional commitment to religious freedom is not only good but important; that is because religious freedom has, and always has had, its opponents. Some opponents may resist religious freedom, or contest its applications, only in particular contexts and controversies: Depending on one's interpretation of the facts and

[*] Warren Distinguished Professor of Law, University of San Diego. I thank Larry Alexander and Alan Brownstein for helpful comments on an earlier draft. I also benefitted from commentary at the conference.

[1] On the difficulties of justifying special protection for religion under current assumptions, see STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE 107-50 (2010).

motivations, the recent brouhaha over the proposed Islamic community center near Ground Zero may present an instance. Others may go farther, opposing special legal protection for religion in general and in principle. I am not suggesting that such people are wicked or even necessarily wrong. But they do exist, so if we think religious freedom is a good thing, we cannot be complacent. We need to try to perceive who or what the threats to religious freedom are, and then make arguments and craft strategies to protect religious freedom against such threats.

II. THE HISTORICAL THREATS TO RELIGIOUS FREEDOM

A. *The Classic Threat: Imposed Religious Orthodoxy*

Having started by assuming, I am now going to indulge in some generalizing. For much of the past two millennia, the principal enemies of religious freedom in the West were the proponents (who included nearly everybody) of what we may call imposed religious orthodoxy.[2] These were people—people like Thomas More, whom I deeply admire[3]—who believed that society, acting through institutions both spiritual and secular, and by means both persuasive and coercive, ought to try to ensure that its members adhered to a single faith.

People like More had weighty reasons for holding this belief. For one thing, they were convinced that the faith they sought to maintain was true and conducive to good and virtuous lives, both in this world and the next. Conversely, the errors they sought to suppress were damnable heresies that threatened to deprive those corrupted by them of eternal salvation. But even without regard to salvation, and on a purely mundane level, it seemed that the social order would be most stable and peaceful if everyone embraced or at least conformed to a common faith.[4]

---

[2] *Cf.* Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168 (1992) ("The great evil against which the Religion Clauses are directed is government-induced homogeneity [in religion] . . . .).

[3] *See* Steven D. Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580 (2003).

[4] Sidney Mead explained that for centuries, the "universal assumption"—one held by "[e]very responsible thinker, every ecclesiastic, every ruler and statesman who gave the matter any attention . . . . with no exceptions other than certain disreputable and subversive heretics"—was that "the stability of the social order and the safety of the state demanded the religious solidarity of all the people in one church." SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 60 (1963) (quoting W.E. Garrison).

Today, we may think—or at least we may think we think—that this assumption was mistaken.[5] And indeed, we have learned, or at least so it seems, that society can survive for a good long time with more pluralism, religious and otherwise, than once seemed possible. Even so, many decisions even today would be easier, and many potentially threatening conflicts less intense, if a greater uniformity of belief prevailed among us. Even as we dismiss the classical view, consequently, we often betray a sort of yearning for some encompassing orthodoxy on which we could collectively rely in making political decisions.

In this vein, a good deal of contemporary liberal philosophizing, by John Rawls and like-minded thinkers, effectively tries to restore unity—albeit a sort of artificial or second-order unity—by imploring officials and citizens to refrain from appealing to their divergent "comprehensive doctrines" when making important political decisions but instead confining themselves to a "public reason" based on an ostensible "overlapping consensus."[6] These thinkers seem repelled by the spectacle of a political open market in discourse in which people propose and argue about whatever beliefs and reasons they happen to favor.[7] "Public reason" philosophizing arguably proceeds on much the same basic assumption, secularized and updated, as did the classical proponents of a religious orthodoxy.

Imposed religious orthodoxy was inconsistent with religious freedom, of course; indeed, it was essentially the antithesis of religious freedom. Since I am assuming that religious freedom is a good thing, I am by logical implication assuming as well that the rationales for imposed religious orthodoxy, even if understandable and perhaps plausible, were ultimately misconceived, or were overcome by weightier contrary considerations, or at least are not apt for our own time and situation. And indeed, beginning in the sixteenth century, an array of rationales began to develop and to gain force in support of the view that imposed religious orthodoxy was unnecessary, undesirable, and unjust.[8]

Simplifying, we might sort these rationales into three general categories. Some of the rationales were based on *skepticism*: Proponents of religious orthodoxies had no very good grounds, critics

---

[5] *Cf.* MICHAEL J. PERRY, THE POLITICAL MORALITY OF LIBERAL DEMOCRACY 78-79 (2010) (asserting that the classical argument that religious uniformity is necessary to protect the unity of society is "belied by historical experience").

[6] *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1996).

[7] For an insightful critical analysis of this orientation, see Jack L. Sammons, *A Rhetorician's View of Religious Speech in Civic Argument*, 32 SEATTLE U. L. REV. 367 (2009).

[8] Madison's famous *Memorial and Remonstrance Against Religious Assessments* amounts to a cogent compendium of such rationales. The *Memorial and Remonstrance* is reprinted in MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 63 (1st ed. 2002).

argued, for their certainty that the orthodoxies they wanted to impose were in fact true.[9] Other rationales were basically *prudential*: At least in conditions of inextinguishable pluralism, it came to seem, efforts to impose religious orthodoxy were more disruptive of than conducive to peace and social order.[10] And some of the rationales were more *principled*, as we say, emphasizing that the supreme goods to which religion aspired—most importantly, salvation of the soul—could only be achieved through sincere, voluntary religious faith, not by coercively imposed creeds.[11]

Eventually this opposition to imposed religious orthodoxy came to prevail. As a result, what seemed almost axiomatically true four or five centuries ago seems to most people today, at least in this country, almost axiomatically false.

In retrospect, we can see how the Constitution's Establishment and Free Exercise Clauses were well calculated to address and eliminate (albeit initially only at the national level) the longstanding practice of governmentally-imposed religious uniformity. The clauses achieved that objective through both a disabling or "denial of power" strategy and an immunity or "rights" strategy. Thus, the Establishment Clause disabled the national government from establishing or imposing any official church or religion. And the Free Exercise Clause protected individuals' right to belong to and profess whatever religion they found credible or congenial.

To more modern sensibilities, complacent in this constitutional heritage, these may seem like negligible protections. Thus, contemporary critics may scoff at decisions like *Reynolds v. United States*,[12] which ruled that the Free Exercise Clause protects religious belief but not religious conduct. My seminar students sometimes make this objection. Protecting *belief* seems to be no big deal. How *could* government—or why *would* government—tell people what they can and cannot believe anyway?

Such disdainful questions neglect to notice that for centuries prior to the adoption of the Constitution, governments had done just that. Victims of the Inquisition might have been profoundly grateful for something like an effective right or freedom to believe or disbelieve as they were so disposed, free from legal investigations and sanctions.

---

9 In this vein, Madison decried the notion that "the Civil Magistrate is a competent Judge of Religious truth" as "an arrogant pretension falsified by the contradictory opinion of Rulers in all ages." *Id.* at 65.

10 *See id.* at 66 ("Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions.").

11 *Cf. id.* at 63 ("It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.").

12 98 U.S. 145, 164, 166 (1878).

Contemporary disdain for the position that holds that constitutional free exercise protects only belief, or perhaps belief and worship, nonetheless reflects an important fact: Today, imposed religious orthodoxy is not the salient threat to religious freedom. The notion that government would tell people which church they must belong to or what religious beliefs they may or may not hold is by now almost unthinkable (in this country anyway).

Nor is this a fresh development. Indeed, by the time the Constitution was adopted, the older project of imposed religious orthodoxy was already on its last legs.[13] Though some American citizens may have feared the establishment of a national church (as Madison told the House of Representatives),[14] in fact it is hard to imagine how that could have happened. The same sensibilities and the same conditions of pluralism that led the Framers to ban religious tests for public office[15] would almost surely have precluded any designation of, say, the Presbyterian Church or the Methodist Church as the official church of America. Indeed, most of the states had already dismantled their religious establishments; the remaining religious establishments in places like Massachusetts and Connecticut were in their dotage, and were retired within a matter of decades—without, we might note, any compulsion from the Constitution or the Supreme Court. And all of the states had adopted constitutional commitments to freedom of conscience.

Which is to say that by the time the Constitution's protections for religious freedom were adopted, they were scarcely needed for the purpose of protecting religious freedom against its classical enemy. Exaggerating to underscore a point, we might say that by the time the First Amendment Religion Clauses were adopted, they were already superfluous.[16]

Nor is there anything especially surprising about this fact. It is no easy thing to adopt a constitutional provision with respect to religion (as

---

[13] *Cf.* Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 692 (1990), *reprinted in* 1 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY 579, 588 (2010) ("Despite these remnants, the fight over religious persecution was more historical than contemporary [in the founding period]. There was no significant sentiment for persecution among the Founders.").

[14] In explaining the need for a nonestablishment provision, Madison told the House that "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." MCCONNELL ET AL., *supra* note 8, at 75.

[15] U.S. CONST. art. VI, cl. 3.

[16] To say this is not to deny, as Alan Brownstein reminds me, that a good deal of law, like much else in society, reflected the prevailing religious and generally Protestant ethos of the country, or that non-Protestants—Catholics, Jews, Mormons, and others—were sometimes subjected to discrimination, cultural marginalization, and even violence. But the First Amendment religion clauses as they were understood at that time provided no remedy for these sorts of difficulties.

the numerous failed attempts over the decades to alter the Constitution's treatment of religion attest). For such a provision to be adopted, a consensus will already need to have formed in favor of the concrete prohibitions, principles, or commitments reflected in the provision. But the existence of that consensus tends to ensure that the law will have little occasion to impose itself coercively and directly. Put it this way: The constitutional law of religious freedom is typically a response to *past* practices that "We the People" have by consensus come to condemn. The convergence in condemnation needed to adopt any particular constitutional response to such conflicts means that by the time the law can be adopted, the practices to which the provision is addressed are likely to have passed out of active use and favor anyway. Consequently, the constitutional provision is likely to be largely superfluous—at least as a positive legal response to the practices which generated the provision.

I add that last qualifier because constitutional provisions can serve various purposes, including expressing a political community's understanding of its core or constitutive commitments. I think the Constitution's provisions on religious freedom serve this vital function, which is to some degree independent of those provisions' more mundane function as positive law. As positive law, however, the clauses had little occasion for enforcement over the new Republic's first century-and-a-half. And indeed, following their enactment, the Establishment and Free Exercise Clauses almost immediately went into a long, mostly undisturbed hibernation.[17]

The clauses were aroused from their slumber in the mid-twentieth century, albeit in different ways. The Establishment Clause was revived and put to work when the Supreme Court decided to infuse the clause with new meanings not contemplated by its enactors, and to use the transformed clause for new purposes that were in some senses contrary to the enactors' expectations. That development, though, is not the subject of this Essay or this Symposium. This Symposium is about the Free Exercise Clause, which was rousted out in order to address a new threat to religious freedom.

B. *The New Threat: Democratic Disregard*

So, what was this newer threat? As we have already noticed, in the emerging democracy that was the United States of America, the older notion that government should force everyone to belong to a common

[17] An occasional litigant tried to assert a violation of the Religion Clauses, but the Supreme Court consistently rejected such assertions. *See, e.g.*, *Reynolds*, 98 U.S. at 164; Permeoli v. New Orleans, 44 U.S. (3 How.) 589 (1845).

religion had largely disappeared. Instead, the various new governments—national, state, and local—would act in pursuit of goals and policies that we can call (with misgivings) "secular."[18] But even though secular laws are not enacted for the *purpose* of imposing a religious orthodoxy, in a diverse nation they will sometimes have the *effect* of requiring or forbidding things that are inconsistent with some people's religion. Democratic governments *might* try to avoid such conflicts and to accommodate minority religions. But then again they *might not* do this—because they are unaware of the burdens they are imposing on religion, or because they are aware but don't care, or because they think it impractical or objectionable to excuse religious dissenters from generally applicable laws. Whatever the background reasons, such laws will burden religious freedom as it is commonly understood, and as I have defined it.

So, do democratic majorities have some constitutional obligation to accommodate religious minorities? It is a hard and contested question, I think, whether we are talking about the original meaning of the Free Exercise Clause or about the normative demands of justice. Our actual history with respect to the question is well-known, however, at least in its general outlines. Despite promising hints in earlier cases,[19] it was not until 1963, in *Sherbert v. Verner*,[20] that the Supreme Court articulated a constitutional doctrine calculated to address the problem of democratic disregard. In *Sherbert* the Court indicated, basically, that if a law burdened some people's exercise of religion, then the religious objectors should be exempted from obeying the law unless the state had an especially strong reason—a "compelling interest," as we often put it—for requiring their compliance.

The *Sherbert* doctrine appeared to give substantial protection to the free exercise of religion. In practice, however, as is also well-known, in the cases that reached the Supreme Court, religious objectors hardly ever won. This pattern led cynics to believe that the ostensible strong protection for free exercise held out by the *Sherbert* doctrine was mostly a sham. And in 1990, in *Employment Division v. Smith*,[21] the Supreme Court embraced a more candid constitutional doctrine (albeit in a less than candid opinion[22]), basically repudiating mandatory free exercise exemptions and ruling that so long as a law is religiously "neutral" and

---

[18] For discussion of the difficulties and different meanings of the term "secular," see SMITH, *supra* note 1, at 113-15, 128-30.

[19] Mainly in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[20] 374 U.S. 398 (1963).

[21] 494 U.S. 872 (1990).

[22] Even scholars who approved of the result found the reasoning and use of precedent difficult to justify. *See, e.g.*, William Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991).

"generally applicable" (whatever those terms mean[23]), the constitutional requirements have been satisfied.

In retrospect, we might offer a more charitable interpretation of the Court's performance during the relatively short-lived *Sherbert* regime. Just as centuries elapsed before the classic threat to religious freedom—namely, imposed religious orthodoxy—was eventually answered by legal measures such as the Constitution's nonestablishment and free exercise provisions, so decades passed before the newer threat of democratic disregard was answered by the development of the *Sherbert* doctrine. And just as the Establishment and Free Exercise Clauses were in one respect largely superfluous by the time they were adopted—because the consensus needed for their adoption meant that the practices against which they were directed had already largely lost their energy and momentum—so by the time the *Sherbert* doctrine was adopted the American political experience had already taught Americans the importance of trying to accommodate religious minorities. Thus, despite the conventional wisdom in law schools that courts are more sensitive to individual rights than are legislatures, a good case might be made that legislatures have in fact been more protective of religious freedom than courts have been.[24]

Nor should this state of affairs be especially surprising. Judges, for all their admirable qualities, generally are not—and are not supposed to be—innovative thinkers or bold pioneers. They tend to reflect the values that are prevalent in their society, or at least in the cultural circles in which they live and work.[25] Judges would not be likely to hold the view that accommodation of religious minorities is a good thing—indeed that it is such a basic and obvious good that it should be imputed to the Constitution itself—unless lots of people held similar views. So if judges come to favor accommodating minority religions, other government officials, including even legislators, are likely to favor the same thing.

To be sure, there will always be disagreement about how much democratic majorities, or society at large, should sacrifice in order to accommodate religious minorities. And so most of us will be able to

---

[23] For discussion of the difficulties, see STEVEN D. SMITH, GETTING OVER EQUALITY 106-13 (2001).

[24] *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 240-46 (2007); *cf.* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1837 (2006), *reprinted in* RELIGIOUS LIBERTY, *supra* note 13, at 709, 753 ("From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions [for religion].").

[25] Thus, John Jeffries and James Ryan argue that the Supreme Court's evolving interpretation and use of the Establishment Clause can plausibly be understood as a response to political developments. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

point to cases in which we think that wrong judgments were made, and that government institutions should have been more protective of religious freedom: For me, *Goldman v. Weinberger*[26] (the Air Force yarmulke case) and *Lyng v. Northwest Cemetery Protective Ass'n*[27] (the Native American sacred site case) are two such instances. But I see no across-the-board reason to suppose that judges will always or even usually be more solicitous of religious freedom than legislatures would be.[28] And indeed, in the *Goldman* case Congress acted to protect religious freedom after the Supreme Court refused to do so (as the Oregon legislature did following *Smith*).[29]

Admittedly, the court-created phrase of "compelling interest" sounds like a very rigorous requirement—one that legislatures probably often fail to meet. But in fact the term has no definite content, and the Supreme Court itself has not always used that precise term anyway.[30] It was probably always more sensible to understand constitutional doctrine to mean more or less what the International Covenant on Civil and Political Rights prescribes—namely, that religious exercise should be accommodated unless such accommodation detracts from "public safety, order, health, or morality or the fundamental freedoms of others." Or, in other words, constitutional doctrine during the *Sherbert* era might sensibly be understood to mean something like this: Even when acting for legitimate secular purposes, government should not lightly impose burdens on the exercise of anyone's religion, but if government is not merely being insensitive but instead has solid and legitimate reasons for declining to exempt religious objectors from

---

[26] 475 U.S. 503 (1986).

[27] 485 U.S. 439 (1988).

[28] In this respect, Robert Nagel's skepticism about the common assumption that judges will be more protective than legislators of free speech might be extended, with minor adjustments, to free exercise. *See* ROBERT F. NAGEL, CONSTITUTIONAL CULTURES 54-59 (1989). Nagel notes that

> [n]otwithstanding assertions to the contrary, the actual training and experience of judges are of dubious value in preparing them to understand or protect the freedom of speech. Many judges exhibit extraordinary degrees of intolerance every day in their courtrooms, and virtually all of them exercise broad and abrupt powers of suppression in discharging their duties. It is at best unclear why the normally sedate and highly controlled atmosphere of a courtroom is thought to be a good training ground for appreciating the dynamics of vigorous public debate. In contrast, political involvement and accountability provide much of the experience that one might expect would lead to a useful understanding of the requirements of a system of free speech. It is, of course, political candidates who engage in open political debate. They should understand the needs of political of political organization and private association because they work in these settings. Indeed, to assume that politicians do not understand or appreciate the needs and values of a system of free expression is to assume that they are blind to the world they inhabit and on which they depend.

Id. at 54-55.

[29] EISGRUBER & SAGER, *supra* note 24, at 240-41.

[30] *See* SMITH, *supra* note 23, at 92-95.

complying with a general law, courts should defer to such democratic judgments.

If we understand the *Sherbert* doctrine in something like this sense, then it is not so surprising or offensive that few religious objectors prevailed in cases that reached the Supreme Court. That fact is not necessarily evidence of hypocrisy or spinelessness on the part of Justices who declared a strong commitment to religious freedom but then failed to honor the commitment. Instead, the low win percentage for religious objectors in court might be the product of two factors: (a) the fact that democratic legislatures had already acquired the habit of trying to accommodate religious minorities; and (b) the deference that courts properly pay to judgments by other, more electorally accountable branches.

By this analysis, the *Sherbert* doctrine was for the most part unobtrusive because it was, under then-prevailing political conditions, largely superfluous as an instrument of positive law. Democratic disregard was a problem that had largely been overcome, and to the extent that it persisted, and persists, it is not a problem that properly deferential courts are likely to be able to do much about anyway. And so it might seem that the repudiation of the *Sherbert* doctrine in *Smith* represented no great loss.

What this conclusion overlooks, however, is the possibility of new threats to religious freedom. Just as the classic threat of imposed religious orthodoxy receded but was replaced by the newer threat of democratic disregard, so the gradual overcoming of democratic disregard through political habits of accommodation might be succeeded by newly emergent threats to religious freedom. The *Sherbert* doctrine, and the constitutional commitment that it reflected, might be (or rather might have been, if they had not been repudiated) of use in addressing such emergent threats.

But these sentences propose purely hypothetical possibilities. Are there in fact contemporary threats to religious freedom? And might the *Sherbert* doctrine be helpful in protecting against such threats?

III. EMERGING THREATS TO RELIGIOUS FREEDOM?

Theses are hard questions, I think. But we can say this much: Some people—some intelligent, informed people—*believe* there are emerging, serious threats to religious freedom. And while it is not obvious that these people are right, neither is it certain that they are wrong.

Let us notice three such gloomy assessments. David Novak, a rabbi and scholar at the University of Toronto, declares: "Make no

mistake about it, religious liberty is being seriously threatened today."[31] Novak's concern is focused mostly on efforts to push religion entirely into the private sphere, in a rather narrow sense of private. He is also worried about the impact of the movement for gay rights on religious freedom. In this respect, Novak discusses a case in Ontario—the Marc Hall case—in which a male homosexual student successfully sued his Catholic high school for discrimination because the school refused to let him bring his boyfriend as his date to the annual prom for graduating seniors. Not only did the Catholic school lose the case, Novak points out, but the case provoked a good deal of public commentary that was hostile—hateful, Novak thinks—toward Catholicism because of its commitment to traditional Christian sexual morality.[32] In this rhetoric Novak discerns an "antireligious agenda that makes Marc Hall a pawn in a much larger battle, of which he and his Catholic parents seem to be naively unaware."[33] And Novak adds that "[t]he threat to religious liberty is by no means a uniquely Canadian problem. Indeed, it is a problem facing every religious community in every constitutional democracy."[34]

A second, similar assessment comes in the form of a statement called the Manhattan Declaration, drafted in 2009 by several Christian thinkers and later signed by hundreds of thousands of citizens.[35] The Declaration succinctly and forcefully articulates traditional Christian positions with respect to the value of life, marriage, and religious liberty, and in feisty terms expresses the commitment of its signatories to the defense of these positions.[36] With respect to religious liberty specifically, the Declaration expresses concern over efforts to weaken so-called "conscience clauses," "the use of anti-discrimination statutes to force religious institutions, businesses, and service providers of various sorts to comply with activities they judge to be deeply immoral or go out of business," and the possibility of legal actions against

---

31 DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 85 (2009).

32 *Id.* at 89-99.

33 *Id.* at 99.

34 *Id.* at 86.

35 The Declaration, along with explanations and background information, may be found at www.manhattandeclaration.org.

36 The Declaration criticizes

> a growing body of case law [that] has paralleled the decline in respect for religious values in the media, the academy and political leadership, resulting in restrictions on the free exercise of religion. We view this as an ominous development, not only because of its threat to the individual liberty guaranteed to every person, regardless of his or her faith, but because the trend also threatens the common welfare and the culture of freedom on which our system of republican government is founded.

Manhattan Declaration: A Call of Christian Conscience, MANHATTANDECLARATION.ORG, http://www.manhattandeclaration.org/the-declaration/read.aspx (last visited Apr. 18, 2011). And the Declaration ends on a defiant note: "We will fully and ungrudgingly render to Caesar what is Caesar's. But under no circumstances will we render to Caesar what is God's." *Id.*

Christians "for preaching Biblical norms against the practice of homosexuality." The Declaration notes that clergy have sometimes been prosecuted in Canada and Europe for such preaching, and it worries that "[n]ew hate-crimes laws in America raise the specter of the same practices here."

A third expression in a similar vein occurred in a speech given in 2009 by Dallin H. Oaks, an Apostle in the Mormon Church (and a former legal scholar and state supreme court justice).[37] Oaks, who wrote about religious freedom as a law professor at the University of Chicago in the 1960s,[38] observes: "During my lifetime I have seen a significant deterioration in the respect accorded to religion in our public life, and I believe that the vitality of religious freedom is in danger of being weakened accordingly." More specifically, Oaks expresses concern about "(1) the rising strength of those who seek to silence religious voices in public debates, and (2) perceived conflicts between religious freedom and the popular appeal of newly alleged civil rights"—in particular the claimed right to same-sex marriage.

A common element in these statements is a concern that laws designed to protect the interests of gays and lesbians may conflict with, and threaten, the moral positions of traditional Christianity—and also, Novak argues, the moral traditions of Jews, Muslims, and Hindus as well.[39] The primary legal and rhetorical vehicle for this movement has been equality: The argument is that traditional religious morality is inconsistent with contemporary commitments to human equality, and that the institutional practices of such morality are in violation of anti-discrimination laws.

A specific focus of such concerns is evident in recent discussions about the possible implications for religion and religious liberty of the legal recognition of same-sex marriage. Opinions and predictions differ, but some knowledgeable scholars and actors foresee significant conflicts, including the possible loss of tax exempt status for churches or church-sponsored institutions that maintain their traditional position that marriage is a union of a man and a woman.[40] In this respect, Douglas Laycock summarizes a recent collection of essays with the observation that "[a]ll six contributors—religious and secular, left, center, and right—agree that same-sex marriage is a threat to religious liberty."[41] Laycock expresses frustration over these emerging conflicts

---

[37] Elder Dallin H. Oaks, Remarks at Brigham Young University-Idaho: Religious Freedom (Oct. 13, 2009) (transcript available at http://newsroom.lds.org/ldsnewsroom/eng/news-releases-stories/religious-freedom).

[38] *See* THE WALL BETWEEN CHURCH AND STATE 142 (Dallin H. Oaks ed., 1963).

[39] NOVAK, *supra* note 31, at 94.

[40] For a collection of essays on the subject, see SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008).

[41] *Id.* at 189.

because he himself favors both religious liberty and gay rights, and he thinks these two causes ought to be mutually compatible and even reinforcing. But in his experience, few people on either side seem inclined either to agree or to compromise:

> It is all very frustrating, but in the real world, it seems utterly unavoidable. Each side sees the other as a genuine threat to its values and to its own liberty. Many of the activists on each side do and say things that lend credence to the other side's worst fears.[42]

In a similar vein, Alan Brownstein advocates a middle ground position in which same-sex marriage is legally authorized but this authorization is combined with meaningful exemptions or accommodations for religious objectors.[43] Like Laycock, however, Brownstein laments that neither side in this conflict seems much interested in compromise. Religious opponents of same-sex marriage are not content to receive free exercise accommodations; they continue to oppose extending marriage to same-sex couples. Conversely, proponents of same-sex marriage are often reluctant to grant any significant accommodations to religious institutions or believers who adhere to traditional views of marriage.

So, why are traditional believers and proponents of same-sex marriage both so reluctant to compromise?

A. *Imposed Secular Egalitarianism?*

I began this Essay by assuming, and then generalizing; I come now to the speculating. And I stress that what follows is speculation, not prediction. The one thing that historical experience allows us to predict

---

[42] *Id.* at 191; *see also* Douglas Laycock, *A Conscripted Prophet's Guesses about the Future of Religious Liberty in America*, *in* RELIGIOUS LIBERTY, *supra* note 13, at 445, 452-53. Laycock asserts:

> The leaders of the gay rights movement, and the leaders of the evangelical religious movement, both want a total win. They don't want to have to litigate over exceptions; they don't want to risk an occasional loss. It was the gay rights movement that rallied the broader civil rights movement to kill the proposed Religious Liberty Protection Act. There, religious groups offered far more in search of compromise than gay groups offered, but still the religious groups could not pass a bill guaranteeing religious liberty. That experience, and experience in state legislatures, leads me to predict with considerable confidence that there will be gay rights laws with absurdly narrow religious exemptions—perhaps eventually with no exemptions at all—and there will be conservative believers who oppose enactment, resist compliance, and seek exemptions. As the gay rights movement continues to make progress, we are likely to see more and more serious religious liberty issues arising out of its success.

Id.

[43] Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 1 (2010).

with confidence about the future, I believe, is that our predictions about the future are likely to be misguided—often comically so. But it does not follow that we should or even can avoid speculating; aside from its (dubious) predictive value, such speculation is one way of reflecting on our present situation. And so I propose to speculate away.

So let me begin by observing that the campaign for same-sex marriage is only one part of a larger movement that we might describe as secular egalitarianism. There is a general (albeit sometimes contested) understanding at elite cultural levels—among judges, legal scholars, and political theorists in particular—that legal decisions should be based on secular grounds and that public discourse with respect to important legal and political issues ought to be secular in nature: This understanding is reflected in—and to some degree enforced by—Establishment Clause doctrine requiring that governments act only for secular purposes and in ways that have predominantly secular effects.[44] And within that secular discourse, one value that currently enjoys virtually unquestioned support is equality. Everyone is entitled to "equal regard,"[45] we say, or "equal respect," or "equal concern and respect"[46]: Some such proposition is treated as axiomatic.[47] In this political-moral scheme, traditional virtues and vices get reordered. Previously "deadly sins" like pride, lust, and sloth are displaced on the list of evils by more currently loathsome traits—bigotry and intolerance. Consequently, a good deal of political polemics (and, for that matter, of constitutional jurisprudence[48]) consists of efforts to show that one's opponents are guilty of that vice, or are failing to accord "equal respect" to some disadvantaged but deserving group.

In many ways, this movement to realize secular egalitarianism in law and politics is much like the older position favoring an imposed religious orthodoxy.[49] We might note three similarities. First, just as

---

44 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

45 *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard, in* LAW AND RELIGION: A CRITICAL ANTHOLOGY (Stephen M. Feldman ed., 2000).

46 *See, e.g.*, Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, 905 (2010) ("It is a fundamental principle in our society that all people are . . . entitled to be treated with equal concern and respect."); *see also* Ronald Dworkin, *Justice for Hedgehogs*, 90 B.U. L. REV. 469, 470 (2010) (discussing the principles of "equal concern and equal respect").

47 *See* Minow & Singer, *supra* note 46, at 905 (describing equality principle as "a foundational value").

48 Thus, citing "a substantial number of Supreme Court decisions, involving a range of legal subjects, that condemn public enactments as being expressions of prejudice or irrationality or invidiousness," Robert Nagel shows how "to a remarkable extent our courts have become places where the name-calling and exaggeration that mark the lower depths of our political debate are simply given a more acceptable, authoritative form." Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193, 199 (1993).

49 Inasmuch as the following discussion focuses on the "dark side" of secular egalitarianism, I should acknowledge that the philosophy has a great deal to recommend it. Among other things,

the proponents of religious orthodoxies were often smugly certain of their views, the proponents of secular equalities often seem sublimely untroubled by doubt. Here, again, I am generalizing. But in my experience, many (not all) academic proponents of same-sex marriage simply cannot conceive of any "rational basis" for the traditional view; the only explanation for those who hold that view is that such people—people like myself—are acting from irrational prejudice, or are in the grip of mindless tradition or religious authority.[50] And indeed, that is pretty much what Judge Vaughn Walker concluded in the recent California Proposition 8 case.[51]

Second, the proponents of secular egalitarianism view it as the foundation of our legal and political order. True, there is room for debate about exactly what secular equality entails or requires. But the basic commitment—to equal respect—is not merely one good thing among others (along with "domestic tranquility," economic prosperity, and other goods) that government tries to promote. The commitment is the very basis of political legitimacy in our constitutional order[52] (just as Christianity was thought to be the foundation of the social order half-a-millennium ago).

Third, secular egalitarianism is like classical religious orthodoxies in that it is not content to regulate conduct,[53] but instead seeks to penetrate into hearts and minds. *Respect*, after all (equal or not), is not just a matter of outward conduct, but of internal attitudes, intentions, beliefs and understandings. Naturally, therefore, the proponents of secular equality and equal respect are concerned with purifying the motives and understandings of government officials and citizens, and also with assuring citizens that they are equally *respected*. A governmental act that might be perfectly acceptable if done with a proper secular purpose is unconstitutional if done with an unapproved invidious purpose.[54] An act of violence performed with an inegalitarian

as Alan Brownstein reminds me, secular egalitarianism in some ways is calculated to promote an inclusive public square that welcomes, among others, some religious groups that otherwise may be relegated to "outsider" status.

50 *See, e.g.*, Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1 (2005).

51 Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

52 *See, e.g.*, Dworkin, *supra* note 46.

53 In *Reynolds*, the Supreme Court indicated that Mormons were perfectly free to believe in polygamy; they just could not practice it. Similarly, South Carolina never attempted to prevent Adele Sherbert or her religious allies from believing that Saturday is a day for worship and rest, and Oregon imposed no sanctions against believing in the spiritual efficacy of peyote. Governments in these sorts of conflicts were concerned with what people *do*. Conversely, though they were often of necessity content to tolerate silent heresy, the classical proponents of imposed religious orthodoxy ultimately cared, and cared profoundly, about what people *believed*; the Inquisition was stark evidence of that concern.

54 *See, e.g.*, McCreary Cnty. v. ACLU, 545 U.S. 844 (2005). Equal protection doctrine makes discriminatory purpose decisive for invalidating facially neutral laws. *Cf.* Washington v. Davis, 426 U.S. 229 (1976).

motive—a racist motive, for instance—is more culpable than the same violent and illegal act done intentionally but with a different, less reprehensible motive: That seems to be the assumption animating hate crimes laws.[55] And the purpose of central constitutional doctrines is to assure classes of people that they are not "outsiders" or "lesser members of the political community,"[56] or to avoid "dignitary" or "psychic" harms.[57]

In this spirit, in its decision declaring a right to same-sex marriage, the California Supreme Court noted that the state had already adopted domestic partnership laws that allowed same-sex couples to form unions enjoying virtually the same legal privileges and obligations that accompany marriage. So the difference between marriages and domestic partnerships had become mostly a matter of different labels. This concrete equivalency, however, did not satisfy the demands of equality, in the Court's view, and may even have aggravated the problem. That was because the essential equivalency in the legal features of opposite-sex and same-sex unions made the assignment of different labels to those unions all the more conspicuous in conveying a sense of lesser respect and thereby inflicting dignitary harm.[58]

Given these characteristics of the movement to realize secular equality, it is understandable that traditional religion is often viewed as the leading contemporary culprit and opponent of such equality, thus generating the kind of hostile rhetoric and criticism that Novak noted in the Ontario case. Traditional religious institutions and traditionally religious citizens will naturally often oppose the assumption that political decisions and public discourse must be based on "secular" grounds and rationales (at least as the term "secular" is currently understood). They will see this restriction as disfavoring and perhaps effectively disenfranchising them.[59] In addition, traditional religious faiths may often believe and teach things that offend secular egalitarian sensibilities. Such faiths will teach that some people's deeply held beliefs are true while others are false. They will teach that some people are saved and others are not, and that some ways of living are moral and

[55] For a careful critical analysis of this proposition, see Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004).

[56] The assumption animating the "no endorsement" doctrine is that if government endorses religion, it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[57] *See, e.g.*, Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1443-49 (2010).

[58] *In re* Marriage Cases, 183 P.3d 384, 399-401 (Cal. 2008).

[59] *Cf.* Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 656 ("The principle of secular rationale degrades religious persons from the status as equal citizens.").

others are immoral. In these ways, traditional religion will often be a scandal and an offense against secular egalitarian orthodoxies.

Again, Judge Walker's recent decision provides a nice illustration. Walker entered a "finding of fact" declaring that not only discriminatory law or conduct but "[r]eligious *beliefs* that gay and lesbian relationships are inferior to heterosexual relationships harm gays and lesbians." And he supported that finding largely by quoting a series of statements of Catholic, Protestant, and Orthodox beliefs on the subject.[60] This finding seemed in a sense gratuitous; it was not integrated into the judge's legal analysis in any obvious way. Even so (or perhaps *a fortiori*), the willingness of the judge to explicitly and officially censure religious *beliefs*—beliefs no doubt held by millions of Americans—worried even some observers generally sympathetic to the outcome in the case.[61]

Lest I be misunderstood, let me quickly say that I do not think "religion" is opposed to "equality." For one thing, once one grasps the central point of Peter Westen's famous essay,[62] it is hard to see how anyone really *could be* against equality. Does anyone believe that "like cases should *not* be treated alike"? Live disagreements are not over *whether* people should be treated equally, but over what counts as equal or unequal treatment—over what factors and considerations are morally and legally relevant. In addition, traditional religionists will usually agree with many of the specific conclusions favored by secular egalitarians—with the commitment to racial equality, for example. They may even believe they have better and stronger grounds for those conclusions than secularists have.

Thus, it has been argued that religion is in fact the generative source of modern substantive commitments to human equality. Humans differ dramatically in our abilities, qualities, and virtues, but we are nonetheless in some important sense of equal moral worth because we are all made "in the image of God," or because we are "created equal" in being "endowed by [our] Creator" with inalienable rights or dignity. Without these religious presuppositions, some argue, substantive claims about equal moral worth make little sense.[63] And secular egalitarians who inveigh against religion are in a sense turning against their own

60 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 985-86 (N.D. Cal. 2010).

61 *See, e.g.*, David Opderbeck, *Judge Walker and Sin*, L., RELIGION, & ETHICS (Aug. 6, 2010), http://lawreligionethics.net/2010/08/judge-walker-religion-and-harm.

62 Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

63 *See, e.g.*, Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism*, *in* EQUALITY: SELECTED READINGS 295 (Louis P. Pojman & Robert Westmoreland eds., 1997).

intellectual and spiritual parents (on whose support, in fact, they may still be unconsciously dependent).[64]

Even so, traditional religion today often seems to be an enclave of particular views—the sorts of views articulated in the Manhattan Declaration, for example—that offend current secular orthodoxies. Perceptive religionists and devout secularists observe or at least intuit this deep conflict. So it is understandable that proponents of the secular orthodoxies—proponents of same-sex marriage, for example—are not eager to accommodate religious deviations. Why accommodate, and in a sense legitimate, views and practices that are archaic and vicious and subversive of the secular egalitarian social order?[65] For their part, religionists perceive this hostility, and it is natural that they are wary about compromises, described in terms of "exceptions" or "exemptions," that effectively concede the dominant status of the secular orthodoxies that are hostile to them. Once secular egalitarianism is accepted and entrenched as the prevailing orthodoxy, how much sympathy or toleration can they expect over the long run to receive from their secular masters?

B. *Religious Freedom in the* Novus Ordo Seclorum[66]*?*

To be sure, for every religious doomsayer who worries about the ascendency of an oppressive secularism, there is a secular Jeremiah who despairs over a supposedly imminent theocracy.[67] It may be that the more extreme secularizing and theocratizing tendencies in our society will cancel each other out; we can hope so. Still, hypothesizing without predicting that the secular egalitarian orthodoxy is destined to dominate, we may wonder about the prospects for religious liberty in the new

---

64 Jeremy Waldron argues that John Locke's commitment to equality was firmly grounded in religious assumptions and that modern efforts to support the commitment have not to this point succeeded. *See generally* JEREMY WALDRON, GOD, LOCKE, AND EQUALITY (2002). Waldron's concluding observations sound faintly ominous:

> [M]aybe the notion of humans as one another's equals will begin to fall apart, under pressure, without the presence of the religious conception that shaped it. . . .
>
> . . . Locke believed this general acceptance [of equality] was impossible apart from the principle's foundation in religious teaching. We believe otherwise. Locke, I suspect, would have thought we were taking a risk. And I am afraid it is not entirely clear, given our experience of a world and a century in which politics and public reason have cut loose from these foundations, that his cautions and suspicions were unjustified.

Id. at 243.

65 *See infra* note 69.

66 This traditional national slogan, printed on our dollar bills just under the pyramid with the spooky eye, originally meant "New Order for the Ages," but might today be translated as "New Secular Order."

67 *E.g.*, KEVIN PHILLIPS, AMERICAN THEOCRACY (2006).

regime. What reasons might exist for accommodating religious objectors from laws—anti-discrimination laws, for example—grounded in the dominant secular and egalitarian assumptions?

Here I think it should be apparent why, as I remarked earlier, my assumption that religious freedom is a good thing is not merely platitudinous. From the secular egalitarian standpoint, that is, insofar as religious freedom immunizes views and practices that deviate from and work to subvert the secular orthodoxy, religious freedom is *not* obviously a good thing; it may be a distinctly *bad* thing. But if we assume (as I am doing in this Essay) that religious freedom is a precious right, are there reasons that might counsel in favor of protecting it even when it conflicts with a secular egalitarian orthodoxy?

At this point, the rationales that were developed over the centuries to defend religious freedom against its classical opponents—rationales sounding in skepticism, prudence, and principle—might in theory be relevant. For example, apologists might appeal to that old-time skepticism that was good enough for the likes of Locke and Madison. On the basis of very limited evidence derived from the experience of a decade or less, should the proponents of, say, same-sex marriage really be so supremely confident—again I reference Judge Walker's opinion—that an innovation that would materially revise centuries of received understandings about an institution that has been viewed as central to our culture can be peremptorily imposed without harm to the social order? And should they be confident that resistance to their program can only be a reflection of mere bigotry? More generally, should proponents of secular equality be secure in supposing that the commitment to equality, and to human rights, can prosper without the support of the religious premises that nurtured those commitments?[68]

In addition, proponents of religious freedom might dust off the venerable prudential arguments. The effort to impose secular egalitarian premises and conclusions as the basis of our social and political order, they might suggest, is more apt to provoke conflict than to promote civil peace and "public reason." The current, seemingly escalating "culture wars" might be introduced as "Exhibit A."[69] And the friends of religious freedom might call on some of the more principled classical rationales; they might argue, for example, that like the forced confessions of faith under older regimes, an "equal respect" achieved by coercion—by hate crimes laws and constitutional doctrines calculated to invalidate laws passed for disapproved purposes—will not

[68] *See, e.g.*, *supra* note 64; *see also* MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS 11-41 (1998).

[69] *See* Douglas Laycock, *Church and State in the United States*, 13 IND. J. GLOBAL LEGAL STUD. 503, 527 (2006), *reprinted in* RELIGIOUS LIBERTY, *supra* note 13, at 399, 423 (describing the "escalating series of provocations and legal claims from both sides").

in reality amount to virtue or even genuine "respect" at all, but instead to a sort of facade of respect, or an imposed hypocrisy.

So the classical rationales *might* be serviceable under current conditions. But there is reason to doubt their efficacy. After all, some of these rationales had always been available against the practices of imposed religious orthodoxy, but it took the passage of centuries and the development of special and favorable political conditions before they came to be embraced in practice. Moreover, the worldview in which these rationales evolved as arguments for toleration has largely disappeared, at least from the view of secular egalitarians, and so it is easy to forget, or to fail to appreciate, the rationales' force as arguments for the *toleration* of views we firmly believe to be pernicious and false. Instead, the rationales are likely to be remembered and regarded mainly as arguments against *religious establishments*. But, of course, secular egalitarians are thoroughly opposed to religious establishments anyway. The Enlightenment, they may think, was basically a struggle to free people from religious intolerance and superstition;[70] why then should religious error (as secularists suppose) be permitted to frustrate important and legitimate public policies? In this vein, Douglas Laycock observes:

> Many secularists see little reason to accommodate an incomprehensible superstition that has lingered beyond its time, and many modernist believers see no reason why anyone's religious belief should affect the pursuit of public policy. Secular movements on both left and right exhibit the same tendency to excess and absolutism that we see in some religious movements.[71]

So there are reasons to doubt the capacity or willingness of secular egalitarianism to cherish religious freedom. And so we might wonder: Are there *legal* doctrines that can serve to protect religious freedom against the impositions of secular egalitarianism? The question seems worth pondering, even for people (like myself) who doubt that mere legal doctrines could have much force, in the long run, against a dominant orthodoxy of the kind we are imagining.

Various doctrines might be of use. Free speech doctrines have often served to protect religious *expression*.[72] But they are of less use in protecting religious *conduct*, or in shielding religious *institutions* against intrusive secular regulation.

In that respect, doctrines protecting freedom of association might seem more useful. But freedom of association does not seem to be a

---

[70] *See, e.g.*, Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453 (1996).

[71] Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty*, 80 MINN. L. REV. 1047, 1098 (1996), *reprinted in* RELIGIOUS LIBERTY, *supra* note 13, at 651, 698.

[72] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Cantwell v. Connecticut, 310 U.S. 296 (1940).

very vigorous or well grounded legal idea. And the recent decision in *Christian Legal Society v. Martinez*[73] provides little reassurance of any significant commitment to (or even comprehension of) the idea by the current Supreme Court.

If we look to the place that might seem to be the most logical and likely source of protection—namely, the Free Exercise Clause—there is again little cause for hopefulness. That is because free exercise doctrine as currently formulated in the *Smith* decision seems perfectly crafted *not* to provide any protection against the sort of threat to religious freedom that we have been considering. Anti-discrimination laws, for example, appear to be "neutral" toward religion and "generally applicable," which is all that current free exercise doctrine demands. Such laws do not single out religious institutions or religious believers as subjects for their egalitarian requirements. Thus, the logic of current free exercise doctrine offers no resistance to the potential emerging threat to religious freedom. The difficulty of squaring even the minimal so-called "ministerial exemption" from employment discrimination laws with current Religion Clause doctrines[74] reflects the unresponsiveness of those doctrines to emerging challenges.

Conversely, something like the *Sherbert* doctrine would seem to be as well-suited as any constitutional doctrine could be to protecting religious freedom against an oppressive secular egalitarianism. If government were actually required to exempt religious institutions and religious believers from general laws absent some compelling or overriding interest, religious freedom might survive, for a time anyway, even under a dominant secular orthodoxy.

CONCLUSION

I emphasize again that the last Part of this Essay has been speculation, not prediction. My own view, elaborated at length elsewhere,[75] is that American history has been constituted by an ongoing competition, sometimes collaborative and sometimes more combative, between "providentialist" and "secularist" conceptions of the American political enterprise. At the most abstract level, to be sure, constitutional doctrine in recent decades has favored the secularist conception. But even in blessing the secular orthodoxy, the courts have

[73] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010).

[74] *See* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007).

[75] Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. (forthcoming 2011).

often seemed not to understand what they were doing, and the enforcement has accordingly been erratic. So the competition between providentialist and secularist conceptions is ongoing, and I think it is impossible to predict what twists and turns the struggle may take. With the help of luck (or Providence), it may be that neither side will displace the other for a good long time to come.

So it is hardly inevitable that the secular egalitarianism I have referred to will come to be understandingly accepted and entrenched as the orthodoxy on which our republic and our law are founded. Insofar as that development does occur, however, religious freedom will face new and daunting challenges. And under such circumstances, for the friends of religious freedom, *Smith*'s repudiation of the *Sherbert* doctrine may come to seem a more tragic loss than it was at the time the decision was rendered. The *Sherbert* doctrine may have been largely superfluous when it was the accepted doctrine. But its potential value (now unrealized) may be greater now that it has been discarded. *Smith*, conversely, may come to seem more regrettable now or in the future than it was at the time.