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The Last Chapter?

Steven D. Smith

In November 2011, Stanford law professor (and former federal judge) Michael McConnell debated Harvard law professor Noah Feldman at Georgetown University on the topic “What’s So Special about Religious Freedom?”¹ McConnell reminded the audience that the First Amendment singles out religion for special protection, and he argued that this treatment continues to be appropriate today. For his part, Feldman conceded the first half of McConnell’s argument: the First Amendment provides, and framers like Madison supposed, that religious freedom is deserving of special protection. But that supposition is no longer justified, Feldman argued. The Constitution’s special treatment of religion was based on historical conditions and theological commitments that happened to prevail at the founding. But conditions are different now, and in a modern liberal state it is unacceptable for government to act on theological rationales.

Feldman’s position did not appear to be driven by any animosity toward religion. Nor is any such animosity evident in his other work.² Religious belief and expression should still be protected under other constitutional provisions, he insisted, such as freedom of speech. But there is no longer any warrant for singling out *religious* freedom as a special constitutional commitment.

Ordinary citizens might suppose that Feldman’s position was radical, perhaps calculated to provoke (as academic positions sometimes are). Is it really plausible that we would repudiate what many have long regarded as “the first freedom”—one that, by Feldman’s own admission the framers favored and gave pride of place in the Bill of Rights? Far from being audacious, though, in an academic environment Feldman’s argument might

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1. The debate can be viewed at <http://berkeleycenter.georgetown.edu/rfp/events/what-s-so-special-about-religious-freedom>

2. See, e.g., NOAH FELDMAN, *DIVIDED BY GOD* (2005).

more accurately be characterized as ho-hum. In recent years scholars and theorists have increasingly gravitated to this conclusion in one form or another.³ A few of these scholars are pretty plainly disdainful of religion,⁴ but others (including Feldman) are not; indeed, some think they are acting and arguing in the interest of religion.⁵

Thus Douglas Laycock, himself a leading scholar and litigator of religious freedom, reports that “scholars from all points on the spectrum now question whether there is any modern justification for religious liberty.”⁶ Nor is it only academics who are skeptical of special protection for religious freedom. The Obama Administration’s positions in the much discussed “contraception mandate” controversy⁷ and in the less prominent but (for present purposes) more pointed “ministerial exception” case⁸ strongly suggest that the Administration is similarly disinclined to favor special legal protection for religion. In general, the administration argued in the ministerial exception case, churches and religious associations should enjoy the same freedom of association that nonreligious associations have—no less, but also no more. There should be no special constitutional protection covering the right of churches to select ministers according to their own faith-based criteria and judgments. (We will look more closely at the “ministerial exception” case in due course.)

Professor Laycock, himself a vigorous proponent of religious liberty,

3. Some explicitly question the justification for any special protection for religion. *See, e.g.*, Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); Anthony Ellis, *What is Special about Religion?*, 25 LAW & PHIL. 219 (2006); and James W. Nickel, *Who Needs Freedom of Religion?*, 76 COLO. L. REV. 941, 943 (2005). Others argue, in general or with respect to specific issues, for reinterpreting religious freedom to include nonreligious interests and beliefs, and thus to deny any *distinctive* protection to religion or religious beliefs. In this vein, see Scott M. Noveck, *The Promise and Problems of Treating Religious Freedom as Freedom of Association*, 45 GONZ. L. REV. 745 (2010); Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 B.Y.U. L. REV. 1633.

4. *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2012).

5. *See, e.g.*, JOHN D. INAZU, RELIGIOUS LIBERTY WITHOUT RELIGION; AND BRADY, RELIGIOUS ORGANIZATIONS.

6. Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 DETROIT-MERCY L. REV. 407, 423 (2011).

7. For an essay proposing that arguments defending application of the mandate to objecting religious employers are best understood as arguments against giving special protection to religious freedom, see Steven D. Smith, *The Hard and Easy Case of the Contraception Mandate*, U. PA. L. REV. ONLINE 261 (2013).

8. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012).

worries that “[f]or the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle—suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized.”⁹ Once again, though, the argument usually is not that religion or religious freedom should be suppressed— as they were in, say, the Soviet Union, or in the Mexico depicted in Graham Greene’s *The Power and the Glory*—but only that there is no justification for singling out freedom of religion for special recognition. Think of it this way: In the American constitutional tradition, we sometimes talk generically about “freedom” or “liberty”—and this generic liberty receives minimal constitutional protection—but we also have a list of particular and especially cherished freedoms that enjoy special judicial and political solicitude: freedom of speech, freedom of the press, freedom of assembly,¹⁰ and so forth. Traditionally, freedom of religion has been on that list—even at the top of the list. Challenging this tradition, Feldman and like-minded thinkers want to take freedom of religion off the VIP list, so to speak, while allowing that religious people and groups should receive the same protection that others receive under the other freedoms.

If this proposal comes to be accepted, the outcome would be in one sense the last chapter of the story of American religious freedom. The story would then tell how, building on themes that had developed over the past two millennia, founding-era Americans conceived of religious freedom as deserving of respect and legal protection, how this commitment informed commitments to other rights, such as freedom of speech, and how those other rights eventually displaced the ancestral commitment to freedom of religion. It is not self-evident that this denouement would be tragic: after all, ancestors are pretty much progenitors who are remembered, even revered, but who are not around anymore. So it would be in this case. Religious freedom RIP.

And yet there are those, like McConnell and Laycock (and also—full disclosure—myself) who are not enthused about ending the story now or in this way, and who would view such an ending as premature and deeply unfortunate. Those who are not ready for the story to end seemingly include (for now, in alternate terms anyway) the Justices of the Supreme Court.

9. Laycock, *supra* note 6, at 407.

10. *But see* JOHN D. INAZU, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012) (arguing that freedom of assembly has been devalued in modern constitutional jurisprudence).

Thus the Court rejected the Obama Administration's Feldman-like position in the ministerial exception case¹¹—and not in a 5-4 conservative/liberal split, but unanimously, and emphatically. So it seems the story is not necessarily winding down.

And indeed, one might ask: If the founders favored a special commitment to religious freedom, expressly writing it into the Constitution, and if many Americans still favor that position, why amend constitutional jurisprudence to strike freedom of religion from the list of specially preferred liberties? It is a formidable question, I think, and it will reappear from time to time in this chapter. But it is also a real question, not a rhetorical one: it is not a question calculated to intimidate opponents (like Feldman) into embarrassed submission. On the contrary.

So in this chapter we will look at two large-scale historic developments that have combined to make religious freedom a vulnerable constitutional commitment. Edward Gibbon famously argued that the Roman Empire fell as a result of one internal development (the rise of Christianity) and one more external development (the incursions of the so-called "barbarians"). In an analogous way, the regime of religious freedom is currently in jeopardy through the convergence of one development that is partly internal to the tradition of religious freedom and a different development that is mostly independent of that tradition. The internal development is the erosion of the rationales for religious freedom by a secularism that, ironically, can be seen as an implication or at least an offshoot of religious freedom itself. The mostly independent development is the impressive advance of a formidable political and cultural movement that marches under the banner of "equality" and that bids to become a new national orthodoxy with features reminiscent of those that characterized state-supported orthodoxies during the centuries of Christendom.

Religious Inversion, Secular Subversion

The undermining of the justifications for religious freedom has resulted from developments already discussed at some length in Chapters 1 and 4. In Chapter 1, we saw how the distinctive components of the American version of religious freedom—namely, separation of church and state and freedom of conscience—descended from historic Christian commitments. More

11. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012).

specifically, Christianity, in stark contrast to Roman religion and political practice, taught that humans are subject to dual legitimate authorities. We should render unto Caesar what is Caesar's and unto God what is God's.¹² This "render unto" dualism persisted over the centuries in Christian thought: thence Augustine's two cities and, later, Luther's and Calvin's two kingdoms. The Christian division of temporal and spiritual jurisdictions animated the papal campaign for "freedom of the church"—a remote progenitor of American "separation of church and state"—and also, in a post-Reformation and more Protestant development, the movement for freedom of the "internal church" of conscience.

These achievements were powerfully reinforced by another Christian theme—namely, the emphasis on sincere and voluntary faith as the only path to eternal salvation. This distinctively Christian rationale was powerfully deployed by the modern champions of religious toleration and religious freedom—Roger Williams, John Locke, James Madison, Thomas Jefferson. In conjunction with the dual jurisdictions theme, the voluntary faith rationale led to the conclusion that, as Madison put it, religion is "wholly exempt from [the state's] cognizance."¹³

So far so good. But this Madisonian conclusion produced a potentially vitiating paradox. If religion is wholly outside the state's cognizance, wouldn't it follow that the state is precluded from acting on religious rationales? So, did religious freedom mean that governments could no longer rely on the historic rationales for religious freedom? Would religious freedom cancel itself out by vetoing its own supporting premises?

The possibility was rendered more probable by another familiar modern strand of logic that we considered in Chapter 4 and that goes basically like this: religious freedom means that the state must treat people of all religions (or none) *equally*, . . . which in turn entails that the state must remain *neutral* in matters of religion, . . . which in turn entails that the state must remain *secular*, . . . which entails that the state cannot act on or endorse religious views or rationales. We saw in Chapter 4 how this logic of secular neutrality has dominated the modern discourse and jurisprudence of religious freedom. But again, if the state cannot act on or endorse any religious views, then it would seem to follow that the state cannot act on the religious rationales—

12. Luke 20: 21-26.

13. JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in THE SACRED RIGHTS OF CONSCIENCE 309, 309 (Daniel L. Dreisbach and Mark David Hall eds. 2009).

the dual jurisdiction rationale and the voluntary faith rationale—that produced the commitment to religious freedom in the first place. In this way, religious freedom turns on and negates its own supporting rationales.¹⁴ It is like the snake that circles around and swallows itself by the tail.

This self-subverting logic is hardly inexorable, but it is seductive, and intriguing to secular thinkers. Professor Feldman's position in the Georgetown debate may be viewed as the culmination of this logic.

So, if religious freedom can no longer be justified on the basis of the historic rationales that generated the commitment to religious freedom in the first place, what follows? Should we renounce our commitment to religious freedom as a specially protected right, as Feldman (along with other scholars and, arguably, the Obama Administration) have concluded, leaving religious people and groups to fend for themselves on grounds of freedom of speech, freedom of association, and the like? That is one possibility, but hardly the only one. It might be, for example, that even if the historic and religious rationales are no longer available, more contemporary and secular rationales can step in to do the same work. At least until recently, this seemed to be the assumption of most modern scholars or thinkers who paid any attention to the issue¹⁵ (or who *didn't* pay much attention to the issue).

Professor Douglas Laycock is a prominent and articulate representative of this point of view. Like Feldman, Laycock acknowledges that as a historical matter religious freedom was to a significant extent the product of theological rationales;¹⁶ also like Feldman, Laycock insists that it would be improper for government to rely on such rationales today.¹⁷ But Laycock thinks that an adequate secular justification can still be offered for giving special protection to religious freedom.

Laycock's secular case for religious freedom rests on three propositions. First, because people care deeply about religion, attempts to impose or suppress religion have caused significant suffering and conflict. Second, religious beliefs matter immensely to the believers, sometimes leading them to fight, kill, revolt, or suffer martyrdom. Conversely, and third, religious

14. For a more detailed elaboration of this argument, see Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PENN. L. REV. 1419 (1991).

15. See, e.g., 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 480–96 (2008).

16. DOUGLAS LAYCOCK, RELIGIOUS LIBERTY AS LIBERTY, in 1 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY 54, 67 (2010).

17. *Id.* at 58.

beliefs are of little importance to civil government.¹⁸ From these non-theological propositions, Laycock believes we can extract a solid commitment to religious liberty.

So, how strong is this defense? Laycock's first two propositions, basically empirical in nature, would be difficult to dispute. Attempts to suppress religion surely have led to conflict, and suffering: think of the attempts in England to suppress Protestantism (under "Bloody Mary") and then Catholicism (under Elizabeth and James I). And religion plainly is very important to some people, who will sometimes take strong or even desperate action on the basis of their religious commitments: think of the Maccabean insurgents remembered at Hanukkah, or the Catholic conspirators who gave us Guy Fawkes Day, or the perpetrators of 9/11. Both friends and foes of religion will likely concede, and even insist on, this point.

Laycock's third proposition—that religious beliefs are of little importance to government—is more normative, and more contestable. Indeed, a critic might suggest that the proposition is blatantly question-begging: haven't debates about religious freedom basically reflected underlying disagreements precisely about the relevance of religion to government? Still, there is a sense in which the proposition might be acceptable to constituencies of both secularist and providentialist interpretations of the Republic. As we saw in Chapter 3, secularists contend that government should stay clear of religion; for their part, American providentialists have typically insisted that government has no interest in the particularities of different religious beliefs. Remember Eisenhower's oft mocked providentialist statement: "[O]ur form of government has no sense unless it is founded in a deeply felt religious faith [,] and I don't care what it is."¹⁹

There is surely much that could be debated here; for now, though, let us just say that all of Laycock's propositions, charitably regarded, have a decent claim to being at least broadly plausible. So then is the commitment to religious freedom secure after all?

One objection would assert that Laycock's rationale is fatally overbroad. Even if his contentions are true with respect to religious beliefs, they are not true only of religious beliefs: there are other kinds of deeply held or intense personal beliefs—philosophical or moral or aesthetic beliefs of various

18. *Id.* at 58–61.

19. Quoted in Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. MEMPHIS L. REV. 973, 978 (2009).

kinds, perhaps—about which we could say that their suppression would cause suffering and conflict, that the beliefs are of extraordinary importance to some people, and that they are or should be of little importance to government. Laycock acknowledges that under his rationale, critics “may argue that other strong personal commitments should have been protected as well.”²⁰

Laycock responds to this objection in two ways. First, he suggests that “religion” be defined broadly to include many deeply held beliefs that might not conventionally be thought of as religious.²¹ Even so, he acknowledges that his rationale may cover some beliefs that just cannot be considered “religion,” and at this point he appeals to constitutional text and history. We protect religion and not other beliefs or concerns to which his secular rationale might also extend, he says,

for the sufficient reason that other strong personal commitments have not produced the same history. The [constitutionally] protected liberty is religious liberty, and although the word “religion” must be construed in light of continuing developments in beliefs about religion, we cannot rewrite the Constitution to say that religious liberty should not receive special protection.²²

This is a lawyerly answer, and although it may leave theoretical purists feeling a bit queasy, the answer may also be good enough for government work. Laycock is right: the Constitution does refer to “religion” and not to “sincere and deeply held beliefs.” Why isn’t that stark fact enough to settle the debate? Indeed, one might push the point even further and ask, why do we need any extratextual rationale at all for religious freedom? The fact is that the Constitution expressly says, in the First Amendment, that religious freedom gets special protection. So if someone (like Professor Feldman) asks why religious freedom should be protected, why isn’t “Because the Constitution says so” rationale enough?²³

20. Laycock, *supra* note 16, at 64.

21. *Id.* at 74–75.

22. *Id.* at 64–65.

23. *Cf.* Laycock, *supra* note 6, at 430–31 (“I also think we should vigorously enforce free exercise simply because it is in the Constitution, and it is a fundamental error to pick and choose which constitutional rights we want to enforce. If we claim the right to enforce only the constitutional rights we like, then no constitutional right is safe from shifting public opinion.”) (footnote omitted).

It is awkward, though, to have no better answer to give than this one for at least two reasons. First, the meaning of constitutional provisions is frequently contested: this is conspicuously true of the First Amendment's establishment and free exercise clauses. And when controversies and competing interpretations arise, courts routinely and sensibly attempt to construe a law or constitutional provision so as to further its purpose or rationale. If there is no (admissible) rationale, however, or if the proffered rationale is overbroad or underinclusive relative to the provision, this enterprise of interpretation is frustrated.

Second, and perhaps even more important, it is not foreordained that even constitutional provisions will always remain in force. They can be repealed, as the Twenty-First Amendment repealed the Eighteenth (on prohibition). Much more commonly, a provision that no longer seems to resonate with the live commitments and values of a society is likely to become moribund in practice even though, technically, it is still "on the books"—or still in the Constitution. Constitutional provisions rise and fall in their importance and their "gravitational force."²⁴ A provision such as the contracts clause²⁵ can loom large in one period (the mid-nineteenth century²⁶) and retreat into obscurity in a later period (the twentieth century);²⁷ conversely, a provision like the equal protection clause²⁸ can be "the last resort of constitutional arguments" (as Justice Holmes quipped)²⁹ and then somehow mature into one of the main movers and shakers of progressive constitutional jurisprudence. Hence if no cogent (and admissible) supporting rationale can be offered for the First Amendment religion clauses, they risk declining into relative inertness.

It is not entirely clear, though, how these general observations apply to religious freedom specifically. After all, it is not as if there is an entire absence of justification for protecting religious freedom as such. The classical theological rationales articulated by the likes of Jefferson and Madison have not so much been refuted as declared (by some jurists and

24. Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 113 (1977) (discussing the "gravitational force" of precedents).

25. U.S. CONST. art. I, sec. 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

26. See BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 75–77 (1993).

27. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 602–03 (3d ed. 2009).

28. U.S. CONST. amend. XIV, sec. 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

29. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

theorists, like Feldman and Laycock) no longer admissible. But many Americans surely still find those rationales persuasive and admissible. In addition, secular rationales for religious freedom are not wanting: the problem seems to be that these are typically over- or under-inclusive. They cover more than “religion” and less than everything we think of as “religion.” We have already seen how this is true of Laycock’s three-proposition rationale; and the same can be said of other familiar secular rationales, such as the claims that religion is divisive,³⁰ or that religion is central to people’s sense of identity.³¹ Not everything we call “religion” is *always* divisive—sometimes religion serves rather to unify³²—nor is religion central to *everyone’s* self-conception. Conversely, there are things other than religion that can be divisive, or central to some people’s sense of identity.³³

So the secular rationales tend to fit awkwardly with the particular constitutional commitments manifest in the religion clauses. Still, those rationales do provide reasons, even if imperfectly tailored reasons, in support of those commitments.

It might be that, together with constitutional text and history, these sorts of admittedly problematic rationales are solid enough to do the job. Even so, the situation hardly seems stable and secure. So long as there is no significant cost to religious freedom, or no major challenge to it, shaky rationales supplementing tradition and text and shored up by political inertia might be enough to sustain inherited constitutional commitments. Conversely, if a serious challenge arises, the edifice of religious freedom might well go the way of the proverbial house built upon the sand when the storms came along to batter it.³⁴

And, as it happens, the storms are already beginning to beat on the constitutional edifice. There is currently a serious challenge, or set of challenges, to the long-standing commitments to religious freedom. This opposition presents itself under the irreproachable title of “equality.”

30. Justice Stephen Breyer has sometimes stressed this rationale. *See, e.g.,* Van Orden v. Perry, 125 Sup. Ct. 2854, 2868 (2005) (Breyer, J., concurring in the judgment). For a critical analysis, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

31. *See, e.g.,* EISGRUBER & SAGER, *supra* note 3, at 124–28 (2007).

32. *See, e.g.,* William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11 (2002).

33. For elaboration of this point, see Steven D. Smith, FOREORDAINED FAILURE 99–115 (1995).

34. *Matt.* 7:26–27.

The Challenge of Modern Equality

Equality, like religious freedom, is a venerable American ideal. That “all men are created equal” was one of the ostensibly self-evident truths invoked to justify the Declaration of Independence from England; in Lincoln’s revered Gettysburg formulation, this was “*the* proposition” to which the nation was “dedicated” from the beginning. Gordon Wood explains that “[e]quality was in fact the most radical and most powerful ideological force let loose in the Revolution.”³⁵ At the same time, a long line of critics and detractors discerned a disturbing measure of inconsistency and hypocrisy in the nation’s simultaneous professions of equality and its treatment of blacks, Native Americans, women, and minorities of various sorts (racial, ethnic, religious, linguistic, and so forth). The second half of the twentieth century thus witnessed an intensification of efforts to realize equality—through judicial decisions, statutes and regulations, and education—and also to broaden the scope of what equality is thought to entail. Beginning with religion and race, the campaign for equality expanded its efforts to include women, and later—and this seems to be the current front line—gays and lesbians.

The relationship between equality and religious freedom has been complicated. Often the notions have seemed to be intimate allies—identical twins, almost. We have already seen how the most common modern conception of religious freedom— one strongly hinted at by Madison and ascendant (for better or worse) in modern religion clause jurisprudence—understands this freedom in terms of religious equality.³⁶ The state must be neutral as among religions, thereby treating them all as equals, and must not discriminate among citizens, even in its expressions, on the basis of their religion (or lack thereof).

In addition, the claim is often made that religion provided the justification—and still provides the best or even only plausible justification—for the proposition that all people are in some sense morally equal. After all, it is hardly obvious (if I may be permitted a gross understatement) that humans are of equal worth, moral or otherwise: we differ dramatically in our abilities, qualities, and virtues. Even so, we are in some important sense of equal worth-- so goes the argument-- because we

35. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 232 (1992).

36. For a critical discussion of this development, see Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 694–706, 723–30 (2002).

are all made “in the image of God” (as the Bible says³⁷) or because we are “created equal” (as the Declaration of Independence says) by being “endowed by [our] Creator” with inalienable rights or dignity. Commenting on the Declaration’s assertion, Columbia law professor George Fletcher explains that “[b]ehind those created equal stands a Creator, who is the source of our inalienable rights ‘to life, liberty, and the pursuit of happiness.’”³⁸ Without these religious presuppositions, some argue, substantive claims about equality or equal moral worth make little sense.³⁹ On this view, equality is not only *compatible* with religion but *dependent* on religion for its plausibility.

In recent decades, though, the formerly cozy connection between equality and religion has become, if not severed, at least severely strained. For one thing, modern theorists of equality usually do not invoke religious justifications for the claim of “equal worth.” They may not offer any justifications at all, but may instead treat the claim as politically or epistemically axiomatic, and hence in no need of extraneous justification. Examining the positions of leading theorists including Ronald Dworkin, John Rawls, Kai Nielsen, Joel Feinberg, Thomas Nagel, and Alan Gewirth, Louis Pojman finds that none of these theorists offers any cogent justification for egalitarian commitments; usually the theorists simply assert or assume equality, or else posit that in the absence of any persuasive objection we should adopt a “presumption” of equal worth.⁴⁰

Pojman finds this strategy unsatisfactory. He conjectures that egalitarian commitments are “simply a leftover from a religious world view

37. Genesis 1:26–27.

38. George Fletcher, *In God’s Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1611 (1999).

39. See, e.g., LOUIS POJMAN, ON EQUAL HUMAN WORTH: A CRITIQUE OF CONTEMPORARY EGALITARIANISM, IN EQUALITY: SELECTED READINGS 282, 295 (Louis P. Pojman and Robert Westmoreland eds., 1997). Jeremy Waldron argues that John Locke’s commitment to equality was grounded in religious assumptions, and that modern efforts to support the commitment have to this point proven unavailing. See generally JEREMY WALDRON, GOD, LOCKE, AND EQUALITY (2002):

[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.

40. POJMAN, *supra* note 39, at 283–94.

now rejected by all of the philosophers discussed in this essay,”⁴¹ and he wonders whether “perhaps we should abandon egalitarianism and devise political philosophies that reflect naturalistic assumptions, theories which are forthright in viewing humans as differentially talented animals who must get on together.”⁴² But secular liberal theorists seem to draw an opposite inference. If compelling justifications for our commitments to equal worth are lacking, the proper inference is not that we should abandon those commitments, but rather that the commitments do not need any external justification: we should instead accept them as basic and axiomatic (at least in a liberal democracy).

Critics like Pojman may find this assuming away of the question of justification intellectually irresponsible. Irresponsible or not, though, such assuming is by now common, and commonly accepted. Thus, contemporary theorists routinely treat equality as axiomatic. Equality is “a foundational value,” Martha Minow and Joseph Singer explain. “It is a fundamental principle in our society that all people are . . . entitled to be treated with equal concern and respect.”⁴³ Ronald Dworkin agrees: “A political community has no moral power to create and enforce obligations against its members,” Dworkin declares, “unless it treats them with equal concern and respect.”⁴⁴ Or theorists talk about “equal regard,”⁴⁵ or “equal citizenship,”⁴⁶ or “the equal importance of all human lives.”⁴⁷

In this equality-oriented framework, 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—that are thought to violate the “equal respect” axiom. Consequently, a good deal of political polemics (and, for that matter, of constitutional jurisprudence⁴⁸) consists of efforts to show that one’s

41. *Id.* at 283.

42. *Id.* at 296.

43. Martha Minow & Joseph William Singer, *In Praise of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, 905 (2010).

44. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 330 (2011).

45. See, e.g., EISGRUBER & SAGER, *supra* note 3, at 75.

46. *Id.*

47. DWORKIN, *supra* note 44, at 113.

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*

opponents are acting from bigotry or prejudice,⁴⁹ or are failing to accord “equal respect” to some disadvantaged but deserving group.

Equality has moved away from religion not only in its justifications (or disavowal thereof, or indifference thereto), but also in the substantive content that it is thought to carry. Theorists usually understand that just in itself, the concept of equality has no universal or intrinsic substantive content or implications. Equality surely does not entail the absurd notion that all persons, situations, and cases must always be treated in exactly the same way, so that if people who can see are permitted to drive, blind people must be given the same privilege. Rather, equality implies that *like cases* (or, as the common phrase goes, “similarly situated” instances or classes) should be treated in the same way. But the substantive criteria for determining which cases or classes are relevantly alike or “similarly situated” cannot simply be deduced from the abstract concept of equality; they must be supplied from other sources.⁵⁰ For political and legal purposes, the substantive content assigned to equality is likely to come from the surrounding political culture. If it is widely supposed that people of different races or genders are relevantly different, then equality will not require that they be treated in the same way. Conversely, if we come to think that race or sex is irrelevant for legal or political purposes, then our commitment to equality will condemn any discrimination on these grounds.

Professor Laycock suggests that in recent decades, two cultural developments have loaded equality with substantive content that often places it in conflict with religious freedom. One has been the increase in the number and visibility within American society of non-believers—atheists, agnostics, and even people who may have a religious affiliation but little actual belief or religious commitment.⁵¹ Laycock explains how the more active presence of nonbelievers alters perceptions of religious freedom. When everyone or nearly everyone was a religious believer of one kind or another, religious freedom could be seen as “a sort of mutual non-aggression pact” that was beneficial to all. Today, by contrast, “[m]uch of the

Error Rule, 88 NW. U. L. REV. 193, 199 (1993).

49. For further discussion, see STEVEN D. SMITH, *CONCILIATING HATRED, FIRST THINGS* (June/July 2004).

50. The classic statement in legal literature is Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

51. For a discussion of the increase in nonbelievers and an argument about the implications of this development, see Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347 (2012).

nonbelieving minority sees religious liberty as a protection only for believers. On that view, a universal natural right morphs into a special interest demand.⁵² This development is apparent in the now familiar claim that a practice that was once lauded as the fulfillment of religious freedom—namely, exempting religious believers (such as religious pacifists) from some laws that conflict with their faith—is actually a form of illiberal and unconstitutional discrimination.⁵³

The other, probably even more important development, in Laycock's view, has been the growing momentum of the gay rights movement. Laycock observes that in 1993 the Religious Freedom Restoration Act passed with overwhelming support—a unanimous voice vote in the House of Representatives and a 97-3 approval in the Senate—but that five years later, after this act had been partially invalidated by the Supreme Court,⁵⁴ the more modest Religious Liberty Protection Act provoked such substantial opposition that it ultimately failed to pass. What had happened in the interim to produce such different political outcomes? Speaking not only as a scholar but as an active participant in litigation and lobbying, Laycock explains that on the basis of several cases in which landlords had refused on religious grounds to rent to opposite-sex couples, gay rights groups had come to see religious liberty as an obstacle to their objectives.⁵⁵ He lays approximately equal blame on the gay rights movement and on religious conservatives who are loath to accept compromises. But however the responsibility is apportioned, the attitudes of opposition have hardened.

The result of this history is that groups committed to sexual liberty naturally view traditional religion as their principal enemy. . . . If traditional religion is the enemy, then it might follow that religious liberty is a bad thing, because it empowers that enemy. No one says this straight out, at least in public. But it is a reasonable inference from things that *are* said, both in public and in private.⁵⁶

Clashes between the gay rights movement and religious liberty are not confined to the United States. David Novak, a rabbi and scholar at the

52. Laycock, *supra* note 6, at 422.

53. See, e.g., EISGRUBER AND SAGER, *supra* note 3, at 78-120; William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

54. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

55. Laycock, *supra* note 6, at 412-13.

56. *Id.* at 415.

University of Toronto, 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 declined to let him bring his boyfriend as his date to the senior prom. Not only did the Catholic school lose the case, Novak reports, 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.⁵⁷ 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.”⁵⁸ 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.”⁵⁹

Gay rights, however, is hardly the only plank in the platform of secular egalitarianism that can come into conflict with religious freedom. Leslie Griffin emphasizes the conflicts between religious liberty and the equal treatment of women.⁶⁰ Laura Underkuffler, while conceding that “[r]eligious free exercise is important,” argues that it should not be permitted to insulate what she calls “odious discrimination”—namely, discrimination based on “race, color, religion, national origin, sex, sexual orientation, or gender identity.”⁶¹ Although equality is a secondary theme in his analysis, James Dwyer argues that free exercise accommodation is bad for women and children.⁶²

A New Orthodoxy?

Even so, it might seem that these conflicts should be readily negotiable. Why not simply pass legislation (or maintain legislation already in place) prohibiting discrimination based on sex or sexual orientation, for example, or recognizing same-sex marriage, while building in generous exemptions for religious objectors? Centrists like Laycock and Alan Brownstein who

57. DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 88–99 (2009).

58. *Id.* at 99.

59. *Id.* At 86.

60. Leslie C. Griffin, *Smith and Women’s Equality*, 32 CARDOZO L. REV. 1831 (2011).

61. Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069, 2090, 2072 (2011).

62. James G. Dwyer, *The Good, the Bad, and the Ugly of Employment Division v. Smith for Family Law*, 32 CARDOZO L. REV. 1781 (2011).

favor both religious freedom and gay rights propose such compromises,⁶³ and they appear not only disappointed but genuinely puzzled when the proffered compromises meet with suspicion and opposition from both the egalitarian and the religious activists.⁶⁴

But the wariness about compromise is hardly surprising, and it is not merely a manifestation of arrogance or pigheadedness on the part of advocates on each side. Although centrists may view the more hard-line advocates as lamentably shortsighted,⁶⁵ it may in fact be the advocates who are taking the more realistic and long view. That is because the real conflict is not just a set of contingent skirmishes between, on the one hand, a small set of specific political proposals and, on the other, some peripheral teachings of a few religious faiths. The conflict is more fundamental than that.

Suppose that religious groups could set aside their specific objection to, say, same-sex marriage (as some religious groups can, and do). Even so, more essential conflicts would remain. Traditional faiths typically teach that some people's deeply held beliefs are true while others are false. Often they will teach that some people are saved and others are not, and that some ways of living are acceptable to God while others are abhorrent. In these ways, traditional religion in its very essence will often be a scandal and an offense against the whole ethos of contemporary liberal egalitarianism, with its commitment to "equal respect" for all persons and all ways of life or

63. See DOUGLAS LAYCOCK, AFTERWARD, IN SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 89, 90 (Douglas Laycock et al. eds. (2008)); and 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).

64. See, e.g., LAYCOCK, *supra* note 63, at 189, 191 (asserting that "[r]eligious minorities and sexual minorities could easily be on the same side" and that "[i]t is all very frustrating" that the groups cannot seem to cooperate).

65. See also DOUGLAS LAYCOCK, A CONSCRIPTED PROPHET'S GUESSES ABOUT THE FUTURE OF RELIGIOUS LIBERTY IN AMERICA, IN 1 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY 445, 452-53 (2010):

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.

conceptions of “the good.” To be sure, the traditionally faithful may insist that even as they condemn some kinds of conduct as immoral, they respect the equal moral worth of people who engage in such conduct— that they adhere to the adage to “hate the sin but love the sinner.” But secular egalitarians often find such professions close to incomprehensible,⁶⁶ and hence misguided or disingenuous. To say that someone’s way of life is immoral, they argue, is necessarily to imply that the person is of lesser worth, even if the moralist explicitly denies this implication.

It seems, therefore, that traditional religion and contemporary secular egalitarianism are at some deep level fundamentally incompatible. This incompatibility is in some ways reminiscent of the differences we saw in Chapter 1 between classical paganism and the emerging Christian movement. Paganism, as we saw, was a this-worldly affair, and it took a relaxed attitude toward “truth.” Christianity, by contrast, aimed for the eternal salvation of its adherents, and it linked this salvation to the adherence to truth (which was articulated with as much precision as theologians and church councils could muster) and to the rejection of error or heresy. These differences were fundamental, and so although pagan rulers alternated between persecuting Christians and putting up with them, Christianity could never be genuinely assimilated into pagan culture.⁶⁷ Centuries later, much of Christianity—and not only Christianity but what is sometimes called “strong religion” generally⁶⁸—continues to have the features that Christianity exhibited in the Roman empire. Conversely, in its this-worldly emphasis and its desire to separate culture and politics from larger questions of truth,⁶⁹ modern secular egalitarianism has some of the characteristics of classical paganism.

And yet (and this is a main reason why political compromise is so difficult today) in other respects, secular egalitarianism more closely

66. See, e.g., Michael C. Dorf, *Same-Sex Marriage, Second Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1314 (2011); Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 484 (2009); Sharon E. Rush, *Whither Sexual Orientation Analysis? The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RIGHTS J. 685, 720–21 (2008).

67. See Chapter 1, notes 43–74 and accompanying text.

68. GABRIEL A. ALMOND ET AL., *STRONG RELIGION: THE RISE OF FUNADMENTALISMS AROUND THE WORLD* (2003).

69. With reference to the secular liberalism of thinkers like Rawls, Jody Kraus thus explains that “[p]olitical liberalism’s preferred strategy is to substitute the idea of reasonableness for truth.” JODY S. KRAUS, *POLITICAL LIBERALISM AND TRUTH*, 5 LEGAL THEORY 45, 55 (1999).

resembles a secular version of Christendom, under which it was assumed that government should act on and impose a favored orthodoxy. We note three similarities.

First, just as during the centuries from late antiquity through the Peace of Westphalia Christianity was thought to be the foundation of the social order, contemporary proponents of secular egalitarianism view equality as the foundation of our legal and political order.⁷⁰ True, there is room for debate about exactly what secular equality entails or requires (just as there were analogous debates within Christendom⁷¹). And secular egalitarianism allows for a range of choices and ways of life so long as those choices and ways are not incompatible with egalitarianism (Much in the way that Christendom supported an “almost riotous diversity”⁷² of opinions,⁷³ vocations, and ways of life—so long as they were not fundamentally incompatible with Christianity.). But the basic commitment—to equality or 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.

Second, just as the proponents of Christian orthodoxies were (and are) inordinately certain of their views, the proponents of secular equalities often seem serenely untroubled by doubt. Such serenity may reflect the reclassification of equality, noted earlier, from being a proposition in need of justification (which, historically, was often religious) to a fundamental axiom for which no justification is required. In any case, just as the established proponents of Christian doctrines could not imagine that anyone could honestly and understandingly disagree, and therefore dismissed contrary views as the product of ignorance, willful error, or hypocrisy,⁷⁴ so the committed proponents of, say, same-sex marriage sometimes suggest that people who hold the contrary position could only be acting from hatred or irrational prejudice, or are in the grip of mindless tradition or religious

70. See *supra* notes 43–47 and accompanying text.

71. See, e.g., PHILIP JENKINS, *JESUS WARS* (2011).

72. See BRAD S. GREGORY, *THE UNINTENDED REFORMATION* 84 (2012) (describing the “almost riotous diversity” of beliefs and practices in Christendom on the eve of the Reformation).

73. See ALISTER MCGRATH, *THE INTELLECTUAL ORIGINS OF THE EUROPEAN REFORMATION* 69–121 (1987) (describing the rich diversity of views in late medieval theology).

74. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1422 (1990).

authority.⁷⁵ And indeed, that is pretty much what federal judge Vaughn Walker concluded in the California Proposition 8 case.⁷⁶

Third, and perhaps most portentously, secular egalitarianism is like Christianity and Christendom (and unlike classical paganism) in that it is not content to regulate outward conduct but instead seeks to penetrate into hearts and minds. After all, secular egalitarians favor “equal concern and *respect*,” and concern and respect are matters not just of external behavior but of internal attitudes, intentions, beliefs, and understandings. Naturally, therefore, the proponents of equal respect are concerned with purifying the beliefs and motives of government officials, and citizens, and also with assuring citizens not merely that they will be *justly treated* but that they are *equally respected*. Indeed, the whole purpose of central constitutional doctrines today is to avoid “dignitary” or “psychic” harms,⁷⁷ or to assure classes of people that they are not “outsiders” or “lesser members of the political community.”⁷⁸

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 material equivalency, however, did not satisfy the demands of equality and may even have aggravated the problem. That was because, in the court’s view, 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.⁷⁹

From the perspective of this concern for beliefs and motives, a governmental act that might be perfectly acceptable if done with a proper

75. See, e.g., Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 942 (2010) (asserting that “[t]he case against same-sex marriage has become increasingly unintelligible, which obviously will have implications when courts go looking for a rational basis for laws that discriminate against gay people”) (footnotes omitted).

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

77. See, e.g., Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PENN. L. REV. 1375, 1443–49 (2010).

78. 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) (Cal. Sup. Ct. 2008).

79. *In re Marriage Cases*, 183 P.3d 384, 399–401 (Cal. Sup. Ct. 2008).

secular purpose is unconstitutional if done with (or if perceived as having) an unapproved invidious purpose.⁸⁰ Similarly, a private act of violence performed with an inegalitarian motive—a racist or sexist or homophobic motive, for instance—is deemed more reprehensible than the same violent and illegal act done intentionally but with a different, less reprehensible motive: some such assumption apparently animates laws imposing heightened penalties on “hate crimes.”⁸¹ And minorities are thought to be harmed not just by discriminatory *actions*, or even by *words*, but by *beliefs*. Again, Judge Walker’s decision in the California Proposition 8 case 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.” As examples of such harm, Walker quoted a series of Catholic, Protestant, and Orthodox teachings on the subject.⁸²

This conclusion—namely, that a set of religious beliefs in itself constitutes a harm to other citizens and a violation of their equality—demonstrates the fundamental conflict between traditional religion and the emerging egalitarian orthodoxy. Devout secularists and perceptive religionists alike sense or observe the deep and fundamental conflict between contemporary secular egalitarianism and traditional religion. So it is understandable that the proponents of the secular orthodoxies—secular proponents of same-sex marriage, for example, or of aggressive antidiscrimination legislation and policies—are not eager to accommodate religious deviations.⁸³ Why accommodate, and in a sense legitimate, views and practices that are archaic and vicious and subversive of the secular egalitarian order? It is likewise understandable that religious believers are wary about compromises, described in terms of “exceptions” or “exemptions,” that effectively concede the dominant status of a secular orthodoxy that is fundamentally hostile to their beliefs and ways of life.

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

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

82. *Perry v. Schwarzenegger*, 704 F. Supp. 2d, 921, 985 (N.D. Cal. 2010) (Finding 77) (emphasis added).

83. See *supra* notes 63–65, and accompanying text. See also CHAI R. FELDBLUM, *MORAL CONFLICT AND CONFLICTING LIBERTIES*, IN *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY. EMERGING CONFLICTS* 123 (Douglas Laycock et al. eds., 2008).

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 new and puritanically egalitarian secular masters?

A Negotiable Conflict?

To say that the conflict is irreconcilable is not necessarily to say that compromise is impossible. Indeed, compromise on seemingly uncompromisable matters has been an essential component in the American political tradition. Thus in the Philadelphia Convention that drafted the Constitution, the so-called Great Compromise negotiated the seemingly intractable issue of representation in the national legislature—an issue that implicated the fundamental and almost ontological question of whether the new government was a union of states or of persons—by creating a legislature in which one branch would represent states and the other branch would represent the people. Also in the convention, and for almost three-quarters of a century afterward, Americans found ways to compromise on the issue of slavery. In retrospect, it is easy to look back with shame (and with self-ennobling condescension) on these compromises on a matter as fundamental as the enslavement of human beings. Without such compromises, however, the most likely result would not have been the liberation of slaves but rather the fragmentation of the Union.⁸⁴ More recently, although presented as an interpretation of the Constitution, the dividing up of abortion rights in *Roe v. Wade*⁸⁵ into an awkward trimester regime is hard to understand except as a judicially-imposed truce on a matter as seemingly immune to compromise as the sanctity of life and the moral status of the fetus.⁸⁶

Moreover, the constitutional system, with its separation of authority into a national government and fifty quasi-independent “sovereign” states, seems well-designed to facilitate compromise. On contentious issues, it is possible for one position to prevail in one jurisdiction or on one level and for other

84. See Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821 (2011); Steven D. Smith, *Lessons from Lincoln: A Comment on Levinson*, 38 PEPP. L. REV. 915 (2011).

85. *Roe v. Wade*, 410 U.S. 113 (1973).

86. The decision’s attempt at reasoning has been found seriously wanting even by those who support the outcome. See, e.g., MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 54 (1988) (describing the Court’s opinion in *Roe* as “an innovation . . . the totally unreasoned judicial opinion”).

positions to be adopted in other jurisdictions or on other levels. And indeed, the “American settlement,” discussed in Chapter 3, took advantage of this system of federalism and division of jurisdictions to construct what might be viewed as a complex, ongoing compromise on the potentially incendiary subject of religion. Under that regime, more providentialist positions could prevail at one time or in one jurisdiction; more secularist positions could be adopted at other times and in other jurisdictions. School prayer could be (and *was*) forbidden in one state, permitted in another. Neither providentialist nor secularist interpretations or constituencies were permitted to triumph definitively; conversely, both were assured a continuing and legitimate place at the constitutional table.

As we saw in the Chapter 4, however, the modern Supreme Court substantially undid the American settlement and reduced the possibilities of compromise by expanding the role of judge-enforced hard constitutional law in the domain of religion. As it came to be axiomatic that constitutional decisions must be “principled,”⁸⁷ opportunities for pragmatic compromise were reduced. And the “incorporation” of the religion clauses against the states, by mandating that the same constitutional constraints would apply to governments state, local, and national, significantly truncated the federalist space for reaching different accommodations in accordance with local circumstances.⁸⁸

Even so, the Supreme Court may have unwittingly preserved, and indeed exemplified, the possibility of compromise in a different and less appealing way—namely, by being notoriously erratic (or, some might say, unprincipled) in its enforcement of ostensible constitutional principles. The inconsistency of the Court’s establishment clause jurisprudence has become legendary,⁸⁹ and critics generally view this erratic quality as something to deplore.⁹⁰ Occasionally, however, commentators take up the theme of the

87. The seminal statement is Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

88. Several scholars have appreciated this loss and have proposed, in various ways, an expansion of that space. See Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005); and Richard C. Schragger, *The Role of Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1888–89 (2004).

89. See Gregory C. Sisk & Michael Heise, “*Ideology All the Way Down*”: *An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1244–49 (2012).

90. See, e.g., *id.* at 1244, 1249–57 (describing the subjectivity of current doctrine and decisions as “intolerable” and demanding greater formality and predictability).

virtues of incoherence: the fact that the courts come out sometimes on the traditional or providentialist side of controversies and sometimes on the “progressive” or secularist side means that nobody and no side is losing all the time.

Thus, after noting the inconsistencies in religion clause decisions, Phillip Johnson suggested that “the fact that the constitutional doctrine is at times muddled and internally inconsistent does not necessarily mean that it is intolerable. On the contrary, the very fact that the holdings do not fit any abstract pattern may indicate that the Court is steering a careful path between undue preference for religion . . . and undue hostility to it.”⁹¹ William Marshall has argued in a similar vein. “I do not and cannot argue,” Marshall says, “that the Court has embarked on anything remotely approaching a consistent course. Yet there may well be a potential benefit created by this wavering. Because there have been no clear winners, there also have been no clear losers, and it may be that it is the elimination of winners and losers that the religion clauses are ultimately about.”⁹²

It is hard to admire this kind of compromise—namely, one that results from flagrant inconsistency in adhering to announced doctrines.⁹³ I suggested in the preceding chapter that the Court’s unsteady approach, far from pacifying competing constituencies, has left everyone deeply unhappy: adherents of the providentialist interpretation are resentful because their view has been officially declared heretical (and also, of course, because they often lose particular battles), while the secularist side is embittered because of what it perceives as a continuing *de facto* establishment of religion that is inconsistent with declared constitutional doctrine. In the end, though, the courts’ inconsistent course has meant that, for better or worse, the conflict reflected in the debate between Professors McConnell and Feldman remains unsettled. And recent decisions, in which the Supreme Court has decisively straddled the divide, suggest that this irresolution is likely to continue.

The Supreme Court on the Fence

91. Phillip E. Johnson, *Concepts and Compromise in First Amendment Religion Doctrine*, 72 CAL. L. REV. 817, 839 (1984).

92. William P. Marshall, *Unprecedented Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 929 (1985/1986).

93. I have argued elsewhere that a better way of returning to a “softer” constitutionalism would be through tightening up standing requirements, as recent decisions have done (usually arousing the ire of constitutional scholars). See Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN’S L. REV. 407 (2011).

Consider how in close succession, the Supreme Court appeared to embrace, first, the position favored by Professor Feldman and, not long afterward, the position favored by Professor McConnell. It would be easy to become mired in the doctrinal labyrinths that justices and commentators attempted to negotiate in these cases. For our purpose, we will try to avoid those lawyerly quagmires and instead observe how the Court first rejected and then accepted the basic “religion is special” position.

*Christian Legal Society v. Martinez*⁹⁴ arose when Hastings Law School, a public law school in San Francisco, denied official recognition to the Christian Legal Society (CLS) because the group accepted as members only students who could endorse its “Statement of Faith” and who agreed to follow prescribed principles, one of which forbade sex outside heterosexual marriage. Because this restriction effectively excluded sexually active homosexuals from being members of the society, the law school ruled that CLS violated the school’s nondiscrimination policy. CLS (represented in the Supreme Court, as it happened, by Professor McConnell) responded that the denial of official recognition, evidently the first of its kind in the school’s history, violated the group’s rights of freedom of speech, freedom of association, and freedom of religion.

The controversy presented a host of disputed questions, both factual (What was the law school’s policy, exactly? Was the law school’s decision a pretext for excluding a Christian group?) and legal (What sort of “public forum” is a public law school?). For present purposes, the crucial point is that the Supreme Court majority treated the case almost entirely under current free speech doctrine, according to which the law school’s policy was presumptively constitutional as long as it was not intended to suppress the expression of ideas on a viewpoint-discriminatory basis.⁹⁵ Because the purpose of the nondiscrimination policy was presumably to prevent discrimination, not to suppress views, the Court found no free speech violation.

94. *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010).

95. *Martinez* was hardly the first case in which the Court treated a controversy over religion as a free speech case. Perhaps ironically, in an earlier important case, Professor McConnell had prevailed in obtaining funding for a campus Christian newspaper precisely by arguing that given the eligibility of other student publications, the denial of such funding by the University of Virginia was an instance of viewpoint discrimination in violation of the free speech clause. *Rosenberger v. Rector*, 515 U.S. 819 (1995). Of course, insofar as religion is expressive, there is nothing to prevent it from being regarded under both the free speech clause and the religion clauses.

But what about freedom of association and freedom of religion—seemingly the rights most directly implicated? After all, the Hastings policy was not directly about speech at all. But it did exclude from the law-school forum particular kinds of associations—in particular, associations formed on the basis of an operative commitment to a familiar kind of religious faith. So one might have thought that association and religious freedom would be the decision’s dominant themes. In fact, they barely received any notice in the Court’s opinion. Because the right of “expressive association” has been viewed as a corollary of free speech, the Court tersely observed, it would be “anomalous” to find a violation of freedom of association where the requirements of free speech doctrine were satisfied.⁹⁶ As for the exercise of religion, the Court relegated its discussion of the issue to a brief footnote that merely stated that because the law school’s policy treated student groups in the same way, there was no discrimination against religion, and hence no free exercise violation.⁹⁷

By effectively melting freedom of association and freedom of religion into free speech, however, and by interpreting free speech to mean basically viewpoint neutrality in application—the Hastings policy was obviously not viewpoint neutral in its substance—the Court effectively eliminated protection for religious groups against nondiscrimination laws or policies (at least in a “limited public forum”). Focusing on the original Hastings policy under which certification had initially been denied,⁹⁸ Justice Samuel Alito pointed out the implications of this approach:

[T]he policy singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views. An environmentalist group was not required to admit students who rejected global warming. An animal rights group was not obligated to accept students who supported the use of animals to test cosmetics. But CLS was required to admit avowed atheists.⁹⁹

96. *Martinez*, 130 S. Ct. at 2975.

97. *Id.* at 2995 n. 27.

98. In the course of the litigation, Hastings interpreted what on its face appeared to be a standard nondiscrimination policy as an “all-comers” policy, such that all groups had to accept all applicants for membership (subject to a few constraints of uncertain scope and meaning).

99. *Martinez*, 130 S. Ct. at 3010 (Alito, J., dissenting).

The *Martinez* decision seemed to evince the Supreme Court's acceptance of the sort of position favored by Professor Feldman: religious individuals and associations should enjoy the same protections that others enjoy under, for example, the free speech clause, but religion should not be singled out for special or differential protection. Moreover, this ostensibly equal treatment meant in reality that religion can be burdened in ways in which other sorts of commitments or interests will not be, because a rule prohibiting associations from conditioning membership on religious belief obviously will have a much more severe impact on churches or other religious associations than on other groups. An HMO or a country club can admit, say, Hindus or atheists without in any way altering its essential mission: a Christian church that admits Hindus and atheists as full members and officers will be compromising its character as a *Christian* church.

And yet it would be premature to conclude that Professor Feldman's "no special treatment for religion" position had triumphed decisively. In the following term, the Court unanimously came down in favor of special protection for religious institutions in a case called *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*.¹⁰⁰

The case raised the issue of the so-called "ministerial exception" to antidiscrimination laws and labor laws as applied to religious organizations. The underlying question presented by the case was basically this: Do antidiscrimination laws that forbid most employers to discriminate on the basis of sex apply as well to churches, or religious employers, that refuse, for example, to ordain women? Can the Catholic Church, for instance, decline to ordain women and thereby exclude women from a whole host of clerical positions? Or, as Richard Garnett puts the question, "[i]f it would be illegal for Wal-Mart to fire a store manager because of her gender, then why should a religiously affiliated university be permitted to fire a chaplain because of hers?"¹⁰¹

Although federal employment discrimination law expressly allows churches to discriminate in favor of hiring members of their own faith,¹⁰² not all employment laws contain similar exceptions, and even federal law does not expressly permit churches to discriminate on grounds other than religion.

100. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012).

101. Richard W. Garnett, *Do Churches Matter? Toward an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 287 (2008).

102. This exception was upheld against a constitutional challenge in *Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

In particular, the law does not explicitly permit churches to discriminate on grounds of sex. Just on the basis of the law as written, therefore, it would appear that a church that does not ordain and hire women for pastoral positions—the Catholic church is the most conspicuous example—is in violation of federal law, and perhaps of state law as well. For decades, nonetheless, lower courts had ruled that churches have a constitutional right to employ otherwise forbidden criteria such as sex in hiring for “ministerial” positions. Litigation over the issue was common, but the typical dispute argued not over the existence of this ministerial exception but rather about whether a particular position was actually “ministerial.” (For example, is the position of church organist “ministerial”?)¹⁰³

Although uniformly accepted in the lower courts, however, the ministerial exception was much more controversial in academic discussions. Legal scholars pointed out that the constitutional basis of the doctrine was uncertain, that the exception fit awkwardly with current free exercise doctrine, and that it was in tension with prevailing egalitarian values.¹⁰⁴ Academic proposals to abandon the exception were (and are) common.¹⁰⁵ Surprisingly, none of the cases recognizing the exception had been reviewed in the Supreme Court. In *Hosanna-Tabor*, that Court finally had an opportunity to speak to the issue.

The case involved a “called” teacher, Cheryl Perich, who had been dismissed from a Lutheran school when, after a disagreement about the timing of her return to work following a medical leave of absence, Perich had hired a lawyer and threatened to sue the school. (“Called” teachers, as opposed to “lay” or “contract” teachers, were appointed by the congregation and given the title of “Minister of Religion, Commissioned.”) The Equal Employment Opportunity Commission then proceeded to file a retaliation suit on behalf of Perich under the Americans with Disabilities Act. The Court of Appeals ruled for Perich, concluding that there was little difference between what the Lutheran school classified as “called” and “lay” teachers and that, despite its title, Perich’s position was not truly ministerial in nature.

103. *Tomic v. Catholic Diocese*, 442 F.3d 1036 (7th Cir. 2006).

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

105. *See id.*; and Ian Bartrum, *Religion and Race: The Ministerial Exception Reexamined*, 106 *NW. U.L. REV. COLLOQUY*, 191 (2011) (arguing that the exception should not shield churches against claims of race discrimination). For a list of articles calling for curtailment of the exception, see Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 *N.C. L. REV.* 1, 4 n.6 (2011). As his title suggests, Lund carefully defends the exception.

To the surprise of many, rather than focus on defending the position on which the Commission had already won in the Court of Appeals (namely, that the teacher's position was not "ministerial" in nature), the Commission, represented by the United States Solicitor General, primarily argued for the rejection of the ministerial exception altogether. For the most part, the Commission argued, religious employers should be treated like other employers.¹⁰⁶ So then was the Administration saying that if Wal-Mart cannot refuse to hire women as managers, the Catholic Church cannot refuse to ordain and employ women as priests? Not quite—not officially, at least. The Commission argued, as the Court put it, that if the Catholic Church or an Orthodox Jewish seminary were sued for its refusal to ordain women, "religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association."¹⁰⁷ Given that this same "freedom of association" defense had been rejected by the Supreme Court¹⁰⁸ when asserted by organizations like the Jaycees, however, the Commission's position was puzzling at best. The bottom line, in any case, was that no special protection for religious associations or under the free exercise clause was warranted.

The Supreme Court rejected the Commission's position; moreover, it did so unanimously and emphatically, using terms like "untenable" and "remarkable"¹⁰⁹ (words that in the understated vocabulary of Supreme Court opinions typically mean something like "absurd" or "preposterous"). Reciting some of the long history (similar to what we reviewed in Chapter 1) of the church's struggle to achieve independence in its internal affairs from state regulation, the Court concluded that constitutional protection for church autonomy is *not* identical to or coextensive with the more generic

106. The government acknowledged that religious employers are permitted under federal law to discriminate in employment on the basis of religion. The government also acknowledged that courts should avoid deciding religious questions or excessively entangling themselves in religious matters. Brief for the Federal Respondent.

107. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 706 (2012).

108. *See, e.g.*, *New York State Club Ass. v. City of New York*, 487 U.S. 1 (1988); *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). To be sure, the Boy Scouts had prevailed on a freedom of association claim in upholding their right not to employ a gay scoutmaster. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The relevance of *Dale* was dubious, however, because the Court had not ruled that discrimination based on sexual orientation should prompt "heightened scrutiny" by the courts in the way in which discrimination based on race or sex does.

109. *Hosanna-Tabor Evangelical Lutheran Church*, 132 S. Ct. at 706.

freedom of association enjoyed by nonreligious groups. This conclusion was compelled, the Court thought, by the First Amendment itself, “which gives special solicitude to the rights of religious organizations.”¹¹⁰ The Court also ruled that the position of a “called” teacher in the Lutheran school was ministerial in nature, and hence exempted from the coverage of the federal disabilities law. On its face, *Hosanna-Tabor* would appear to be a resounding victory for the “freedom of the church” and, more generally, for the idea that religious freedom is a special right.

But then of course just a year-and-a-half earlier, in *Martinez*, the Court had appeared to come down on the other side of the “Is religion special?” question. So, are the two decisions simply and flatly inconsistent? Maybe, but it is difficult to say so with confidence, because both cases turned in part on doctrinal intricacies (like the amorphous “public forum” doctrine) that prevent a simple side-by-side comparison. And of course future cases will likewise turn on such doctrinal intricacies (as well as on others, such as the amorphous doctrine of “standing”).

At this point, consequently, it would be rash to predict with confidence that either *Hosanna-Tabor* or *Martinez* presages how the Court will come down in future cases. The fundamental debate in which Professors McConnell and Feldman skirmished, and in which Americans generally are knowingly or unknowingly engaged, looks to continue for some time to come.

Freedom of Religion and the Future of the Church

I might conclude this chapter, however, with one tentative and conditional prediction: the fate of religious freedom will likely depend to a large extent on the fortunes of “the church.” As we have seen in the course of this book, religious freedom has historically been connected, in close if complicated ways, to the church. And this connection is likely to continue. So ultimately, if the church continues to be a vigorous and vital institution in society, religious freedom will probably be okay. Conversely, if the church declines, religious freedom (and, perhaps, much else) is likely to go down with it.

This may seem to be a gloomy observation, because the church may seem to be in poor shape these days. For one thing, it may seem that “the

110. *Id.*

church” (in the singular) doesn’t exist anymore; instead, we have a sprawling multiplicity of independent and sometimes mutually antagonistic churches and faiths. For another, some of the major churches have been conspicuously afflicted with scandal and internal dissension. And then there’s the increase in the percentage of “nones”—people who on surveys indicate no religious belief or affiliation.¹¹¹ (Numbers can be deceptive, though: in one 2011 study, 10 percent of self-professed atheists said they pray at least once a week.)¹¹² Adding to these inconveniences is the perennial streak of anticlericalism—or suspicion of “organized religion”—that even religious believers often display. Richard Garnett observes that “[t]oday, churches and their autonomy are often regarded as dangerous centers of potentially oppressive power, as in need of supervision and regulation by the state.”¹¹³

So, if the fate of religious freedom is tied to that of the church, is decline inexorable? Not necessarily. In the first place, however lamentable the multiplicity of churches may seem from some theological standpoints, it is not necessarily a disability for the purpose of upholding religious freedom. A plurality of faiths makes religious freedom more necessary.¹¹⁴ And scholars employing an economic analysis argue that religion, and churches, are actually stronger when there is competition in a sort of religious marketplace.¹¹⁵

Moreover, despite the obvious multitude of churches, in some contexts the practice of referring to “the church,” in the singular, persists. Nor is that practice merely an anachronistic holdover; it captures something crucial in (many) Christians’ self-understanding. Under the familiar view in which “the church” refers in part and perhaps most centrally to something like “the invisible church” and the various observable “churches” are understood to

111. For discussion, see Laycock, *supra* note 6, at 419–22.

112. *Id.* at 420.

113. RICHARD W. GARNETT, “THINGS THAT ARE NOT CAESAR’S”: THE STORY OF KEDROFF V. ST. NICHOLAS CATHEDRAL, IN *FIRST AMENDMENT STORIES* (Richard W. Garnett & Andrew Koppelman eds., 2011). *Cf.* VELI-MATTI KARKKAINEN, *AN INTRODUCTION TO ECCLESIOLOGY* 7 (2002) (observing that “the term *church* for better or worse reasons has been loaded with so many unfortunate connotations from authoritarianism to coercion to antiquarianism”).

114. *Cf.* JOHN NEVILLE FIGGIS, *CHURCHES IN THE MODERN STATE* 101 (1913) (“It was the competing claims of religious bodies, and the inability of any single one to destroy the others, which finally secured liberty.”).

115. *See* RODNEY STARK & ROGER FINKE, *ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION* (2000).

be instantiations or manifestations of that more mystical entity,¹¹⁶ it is still meaningful to refer to “the church,” in the singular. Theologians have developed sophisticated ecclesiologies that emphasize the underlying or immanent unity in the midst of the conspicuous plurality.¹¹⁷ In this vein, theological ethicist Gilbert Meilander writes:

For my part, I believe that the Church’s genuine oneness need not be translated into institutional unity. If this commits me to believing that the one holy catholic and apostolic church is “invisible,” that’s alright. Invisibility in this sense is not a way of escaping from time, place, and embodiment. On the contrary, it is a way of taking time, place, and embodiment seriously, a way of recognizing the multiform manner in which the one Church—under, surely, the governance of the Holy Spirit—has taken shape in human history.¹¹⁸

With respect to other negative indicators, it is good to recall that history usually doesn’t unfold in linear ways. So if you take current trends and project very far forward, you’ll nearly always be wrong. This is true in particular of the church (and, more generally, of religion). Who would have predicted in the year 100, or 200, or even 300 or 310 (in the midst of the Diocletianic persecution), that Christianity would become the official religion of the Empire? Who would have predicted the eleventh century papal revolution, with its campaign to liberate and purify the church, from the midst of the scandalous “dark century” that preceded it? In 1787, who could have foreseen the flourishing of faiths and churches in new American forms that would unfold in the nineteenth century? Through the nineteenth century and the first half of the twentieth, nearly all social scientists and prognosticators foresaw the inexorable decline of religion as modernization took hold.¹¹⁹ Writing in 1968, the sociologist Peter Berger expressed a

116. See, e.g., KARKKAINEN, *supra* note 113, at 51–53, 168–69. Cf. BRIGHAM YOUNG, DISCOURSES OF BRIGHAM YOUNG 441 (John A. Widsøe ed., 1976) (“When this Kingdom is organized in any age, the Spirit of it dwells in the hearts of the faithful, while the visible department exists among the people, with laws, ordinances, helps, governments, officers, administrators, and every other appendage necessary for its complete operation to the attainment of the end in view.”).

117. See, e.g., 3 ROGER HAIGHT, ECCLESIAL EXISTENCE (2008).

118. Gilbert Meilander, *The Catholic I Am*, *First Things*, Feb. 2011, 27, 28. For reservations about this position, see HENRI DE LUBAC, *THE SPLENDOR OF THE CHURCH* 84–102 (Michael Mason trans., 1953).

119. José Casanova explains:

common view in predicting that “[b]y the 21st century, religious believers are likely to be found only in small sects, huddled together to resist a world-side secular culture.”¹²⁰ So much for predictions based on present trajectories or indicators.

One other observation seems necessary. At least in the view of believers, the church is not a merely human institution, and its fortunes will not be determined merely by human agency. Jacques Maritain explained that the church is, in the Christian view, “a supernatural mystery.”

[T]he Church is not only a visible and apparent reality but also an object of faith, not a system of administrative cog-wheels but the Body of Christ whose living unity, incomparably more elevated and strong than in this world we describe as moral personality, is guaranteed by the action of the Holy Ghost.¹²¹

Maritain conceded that this idea would “scandalise unbelievers,” and that “it would even be absurd for those who do not and those who do know what the Church is to form the same idea of what her rights are.”¹²² He was surely right about that much. Nonbelievers will likely find a hope for the church based on the “guarantee” of the Holy Ghost absurd, and quite likely unintelligible. They will think the believers are deluded. If that is so, then the church might well be destined to decline—and religious freedom, perhaps, along with it. We may be living in the last chapter of the story of American (and Western, and indeed global) religious freedom.

But then if the believers are deluded, ultimately, does the story really matter much anyway?

In one form or another, with the possible exception of Alexis de Tocqueville, Vilfredo Pareto, and William James, the thesis of secularization was shared by all the founding fathers: from Karl Marx to John Stuart Mill, from Auguste Comte to Herbert Spencer, from E.B. Tylor to James Frazer, from Ferdinand Toennies to Georg Simmel, from Emile Durkheim to Max Weber, from Wilhelm Wundt to Sigmund Freud, from Lester Ward to William G. Sumner, from Robert Park to George H. Mead. Indeed, the consensus was such that not only did the theory remain uncontested but apparently it was not even necessary to test it, since everybody took it for granted.

JOSÉ CASANOVA, *PUBLIC RELIGION IN THE MODERN WORLD* 17 (1994).

120. Peter Berger, *A Bleak Outlook Is Seen for Religion*, N.Y. TIMES, Feb. 25, 1968, 3.

121. JACQUES MARITAIN, *THE THINGS THAT ARE NOT CAESAR'S* 31 (J.F. Scanlan trans., 1930).

122. *Id.* at 24.

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