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# The End of Religious Freedom: What is at Stake?

Nelson Tebbe\*

Warnings can be heard today that the American tradition of religious freedom is newly imperiled and may even be nearing exhaustion. Steven Smith is an eloquent and accomplished herald of that development,<sup>1</sup> and his warnings have been echoed by other distinguished authors.<sup>2</sup> They worry that we are seeing an unprecedented attack on the very idea of constitutional protections for religion.<sup>3</sup> Although conflicts between secularism and religion are nothing new, this critique is thought to be both more fundamental—because it targets not just particular applications of religious freedom but the notion itself—and more likely to succeed. Religious freedom as a constitutional concept is thought to be at risk.

Three distinct concerns combine to produce this worry, in my view. First, there is the argument that religion is not special—that it should not draw constitutional protection different from the guarantees extended to other commitments of conscience.<sup>4</sup> If religion is not special, then religious freedom as a distinct right could be lost, even if religious actors continue to be protected under other provisions ensuring liberty and equality. Second is the concern that a coherent or rational theory of religious freedom cannot be

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1. See Steven D. Smith, *The Last Chapter?*, 41 PEPP. L. REV. 903 (2014) [hereinafter Smith, *The Last Chapter*]; STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 11 (2014).

2. See generally, e.g., Douglas Laycock, *Religious Liberty and the Culture Wars*, U. ILL. L. REV. (forthcoming 2014) [hereinafter Laycock, *Culture Wars*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2304427](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304427); Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407 (2011) [hereinafter Laycock, *Sex, Atheism*].

3. See Laycock, *Sex, Atheism*, *supra* note 2, at 407, 411; Smith, *The Last Chapter*, *supra* note 1, at 903–04.

4. See Smith, *supra* note 1, at 903-05 (describing Noah Feldman’s argument that religious freedom should not receive special constitutional solicitude).

found.<sup>5</sup> Courts interpret and apply the free exercise and nonestablishment provisions in ways that are incoherent, and unavoidably so. That poses a threat to the future of religious freedom because it engenders instability and vulnerability.<sup>6</sup> Third, there is a sense that the culture wars are over and that they have been won by the forces of secular liberalism.<sup>7</sup> Evidence of that conclusion is strongest in the area of LGBT rights, but it includes other developments as well.<sup>8</sup> A new egalitarian orthodoxy is seen to imperil the rights of religious believers who now constitute an embattled minority in need of counter-majoritarian protection. Yet the same developments that make constitutional protections more necessary also threaten rights of religious freedom, on this view.

In this short Response, I bracket the substance of debates over the health of religious freedom doctrine and whether religion is special. Instead, I ask what is at stake in them. In particular, I am interested in the consequences not only for constitutional litigation, but also for legislation on related issues, and for concrete political controversies that implicate constitutional questions surrounding religious actors. What would change on the ground if one side or the other were to prevail on questions such as whether religion is constitutionally distinctive or whether the doctrine of religious freedom is coherent?

My hypothesis will be that little of consequence turns on those debates when it comes to ground-level legal disputes. In practice, if not in theory, constitutional actors are committed to protecting religious citizens, and that is unlikely to change fundamentally in the foreseeable future. Americans also carry competing commitments to separation of church and state, to fairness for nonreligious persons, to equality for sexual minorities, to equality of opportunity for workers and other economic actors, and so forth. Whether that complex of values gets conceptualized as religious freedom or

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5. See, e.g., *id.* at 25 (noting “flagrant inconsistency” in the Court’s doctrines on religious freedom and doubting whether it can be avoided).

6. See *infra* note 50 and accompanying text.

7. See *id.* at 22 (describing a conflict between “traditional religion and the emerging egalitarian orthodoxy”).

8. See Laycock, *Sex, Atheism*, *supra* note 2, at 412–19 (attributing recent attacks on religious freedom to the LGBT movement and to the recent social salience of nonbelievers); Richard Schragger, *The Politics of Free Exercise After Employment Division v. Smith: Same-Sex Marriage, the “War On Terror,” and Religious Freedom*, 32 CARDOZO L. REV. 2009, 2009–10 (2011) (focusing on the LGBT movement and attacks on Islam after 9/11).

not, and whether religion is thought to occupy a special place in the constitutional order—those are questions that themselves will have little bearing on practical outcomes.

That is not to say that low stakes equals no stakes.<sup>9</sup> Undeniably, the disputes themselves are important—people care deeply and rightly about legislative prayer, the contraception mandate, exemptions from laws protecting LGBT people, and so forth. My skepticism rather concerns how much turns on whether we conceptualize these debates as questions of religious freedom as opposed to broader constitutional concerns about individual liberty and equal citizenship, and whether legal frameworks in the area are comparatively clear and stable. Outcomes will depend more directly on how less abstract commitments are managed in light of ongoing social and political developments.

Furthermore, abstract legal and moral questions about the distinctiveness of religion matter for their own sake, and they can influence more practical matters (just as they are influenced by them). But that influence typically is indirect.

Below, I first offer examples of cases where the specialness of religion underdetermines its protection.<sup>10</sup> Then, I examine disputes where courts have been charged with incoherence or irrationality and I ask whether the charge is accurate, what alternatives exist, and how much doctrinal muddiness can undermine actual protection. Third, I consider the concern with liberal orthodoxy. I assess the trope and I determine that it currently functions as a warning rather than a diagnosis of inadequate protection for religious freedom. I conclude the Response by agreeing with Steven Smith's prediction that religious actors' success in legal disputes will depend most centrally on their fortunes in broader social and political dynamics. Whether constitutional decision-makers protect observance, in other words, will likely follow more directly from the ability of traditional believers to convince Americans that their causes are worthwhile than it will follow from doctrinal niceties.

Elsewhere, I defend the view that complex commitments around

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9. Cf. Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305, 319–21 (2010) (arguing that debates over constitutional interpretation have “low stakes, not no stakes”).

10. See *infra* notes 13–48 and accompanying text.

religious freedom can be managed.<sup>11</sup> Here, the argument is simply that surprisingly few legal disputes would be affected by “the end of religious freedom” as such.<sup>12</sup> We should care about these debates, but we should care about them because of their symbolic impact and moral importance, not primarily because of constitutional outcomes on the ground.

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A first concern voiced by Steven Smith and others is that religion may lose its special status in the American constitutional order.<sup>13</sup> Under the new regime, religious actors would be protected, but only as holders of general rights to free speech, due process, equal protection, etc., and only to the extent that others are protected under those provisions. Not only would that protection be indistinct, it would also be insufficient.<sup>14</sup> Smith gives one main example of a decision where religion is special and wins protection, and one example where religion is elided and goes unprotected.<sup>15</sup> Yet there also are plenty of instances where religious actors *win* under general provisions, and where they *lose* under specific protections, as I will explain in this Section.<sup>16</sup>

Recall first Smith’s own examples. In *Christian Legal Society v. Martinez*, claims by religious actors were evaluated under the same free speech doctrines that apply to everyone, and they were rejected.<sup>17</sup> The Court

11. See Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1127–30 (2011) [hereinafter Tebbe, *Nonbelievers*] (adopting a polyvalent approach to problems of religious freedom).

12. See *infra* notes 101–12 and accompanying text.

13. See Smith, *The Last Chapter?*, *supra* note 1, at 904–05; Laycock, *Culture Wars*, *supra* note 2, at 39–40 (connecting the argument that religion is not constitutionally distinctive to other developments and arguing that together they are “deeply threatening to the American tradition of religious liberty”).

14. See Smith, *The Last Chapter?*, *supra* note 1, at 904 (suggesting that the end of religious freedom would be “premature and deeply unfortunate”); *id.* at 905 (“[T]he regime of religious freedom is currently in jeopardy.”). For Smith, protection will be insufficient without distinctive guarantees for religion because laws passed by the liberal state will disproportionately impact traditional religions. *Cf. id.* at 929 (“[E]qual treatment [in *CLS v. Martinez*] meant in reality that religion can be burdened in ways that 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.”).

15. See *infra* notes 17–26 and accompanying text.

16. See *infra* notes 17–48 and accompanying text.

17. 130 S. Ct. 2971, 2978 (2010). According to Smith, the *CLS v. Martinez* holding “seemed to evince the Supreme Court’s acceptance of the . . . position . . . [that] religious individuals and associations should enjoy the same protections that others enjoy . . . but religion should not be

turned away a complaint that Hastings Law School had denied official recognition to the Christian Legal Society (CLS) in violation of free speech and free exercise rights.<sup>18</sup> Law school administrators reasoned that the organization violated the school's "all-comers" policy by effectively denying membership on the basis of religion and sexual orientation.<sup>19</sup> The Court treated the school's program of recognizing student groups as a limited public forum and it upheld the "all-comers" policy as reasonable and viewpoint neutral.<sup>20</sup> Evaluating religious actors on the same terms as others, the Court turned away their challenge.

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>21</sup> conversely, the Court extended special constitutional solicitude to religion and found in its favor.<sup>22</sup> There, the Justices held that a Christian school could dismiss a teacher even if antidiscrimination laws otherwise would have protected her.<sup>23</sup> The Court reasoned that because she counted as clergy, the school had a constitutional right to dismiss her under the ministerial exception doctrine.<sup>24</sup> Rather than accept the invitation of the Solicitor General to evaluate the case under the rule for expressive associations that applies to everyone, the Court held unanimously that religion was special in this regard—that the ministerial exception was grounded in the free exercise and nonestablishment provisions of the First Amendment, which are particular to religion.<sup>25</sup> In this situation, finding that religion was special

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singled out for special or differential protection." Smith, *The Last Chapter?*, *supra* note 1, at 928.

18. *Martinez*, 130 S. Ct. at 2978.

19. *Id.* at 2980 ("CLS's bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation."). Actually, there was a factual dispute about whether the school really did have an "all-comers" policy or whether it prohibited discrimination only on specific grounds, including religion, but the majority found that the parties had stipulated to an "all-comers" policy and analyzed the dispute accordingly. *Id.* at 2982–84.

20. *Id.* at 2984, 2995.

21. 132 S. Ct. 694 (2012).

22. See Smith, *The Last Chapter?*, *supra* note 1, at 929–32 (discussing *Hosanna-Tabor*).

23. *Hosanna-Tabor*, 132 S. Ct. at 707.

24. *Id.* at 708 ("we conclude that Perich was a minister covered by the ministerial exception"); *id.* at 709 ("Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.").

25. *Id.* at 706 (calling "remarkable" the view that religious activity does not enjoy distinctive constitutional treatment in this context).

meant not only giving it distinctive constitutional treatment, but also giving it greater protection, because the ministerial exception almost certainly is more powerful than freedom of expressive association.<sup>26</sup>

Yet it would be wrong to conclude that extending distinctive constitutional solicitude to religion *necessarily* means granting it stronger protection against majoritarian regulation. In certain cases, the Court has found in favor of religious actors using general provisions, and it has found against them even while treating them specially. Specialness underdetermines constitutional protection, as it turns out.

In a long line of decisions, for instance, religious actors have deployed general speech theories to win substantial victories against governments that sought to exclude them from benefits.<sup>27</sup> Interestingly, these equal access cases involved a deliberate strategy by churches and prayer groups to leverage the general language of individual rights—in particular, the language of equality and antidiscrimination—this time on behalf of traditional religious actors rather than against them.<sup>28</sup> In decisions like *Rosenberger*, *Good News Club*, and *Lamb's Chapel*, the Court held that public educational institutions could not single out religious actors for exclusion once they opened their buildings and resources to a broad range of other groups.<sup>29</sup> In fact, the Court used the very same public forum doctrine featured in *CLS v. Martinez* to find in favor of religious actors on the ground that exclusion of their perspectives constituted prohibited viewpoint discrimination.<sup>30</sup>

Likewise, general government speech doctrine has been deployed

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26. See Tebbe, *Nonbelievers*, *supra* note 11, at 1146–47 (demonstrating that the ministerial exception provides stronger protection than the general right to expressive association).

27. See, e.g., *Good News Club v. Milford Cent. Sch.* 533 U.S. 98 (2001); *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

28. See NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 206–07 (2005) (describing religious actors' strategy of deploying antidiscrimination language and casting themselves as minorities).

29. *Good News Club*, 533 U.S. at 106–12; *Rosenberger*, 515 U.S. at 828–37; *Lamb's Chapel*, 508 U.S. at 391–97.

30. See, e.g., *Good News Club*, 533 U.S. at 111–12 (“[W]e reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination.”).

effectively to preserve the integrity of majoritarian religious messaging. In *Pleasant Grove City v. Sumnum*, for instance, the Court concluded that a town could erect a Ten Commandments monument in a public park without being forced to also include a monument expressing the views of a minority faith.<sup>31</sup> Because the government was expressing its own views, it could discriminate on the basis of viewpoint.<sup>32</sup> Although technically the decision turned away a challenge by a minority faith, it reinforced an assumption that a government could recognize majoritarian beliefs, including religious ones.<sup>33</sup>

Other equality rules have similarly protected religious actors. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, Justice Kennedy reasoned for the majority that a town could not discriminate against Santeria, a faith that practiced animal sacrifice.<sup>34</sup> Town lawmakers had passed an ordinance banning animal killing, but it was riddled with so many exceptions that it effectively targeted only Santeria practices.<sup>35</sup> Justice Kennedy reasoned that although religious groups could not claim special exemptions from general laws under free exercise doctrine, they also were protected from extraordinary government discrimination.<sup>36</sup> Although it is possible to understand the case as applying antidiscrimination protection only to religious groups, an equally natural reading is that the decision enforced equality by requiring the government to refrain from irrational

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31. 555 U.S. 460, 464–67 (2009). *Id.* at 464–67.

32. *Id.* at 479–81.

33. *See id.* There was no Establishment Clause challenge to the Ten Commandments monument before the Court. *See id.* at 466 (noting that the petitioners brought only a free speech claim). Sumnum wanted both displays included, not both excluded, so it did not object to the existing monument. *See* Bernadette Meyler, *Sumnum and the Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 95, 102 (2009) (noting that Sumnum did not bring an Establishment Clause claim), available at <http://www.law.northwestern.edu/lawreview/colloquy/2009/32/LRColl2009n32Meyler.pdf>. Any such challenge probably would have failed under existing doctrine. *See* Christopher C. Lund, *Keeping the Government's Religion Pure: Pleasant Grove City v. Sumnum*, 104 NW. U. L. REV. COLLOQUY 46, 50–52 (2009), available at <https://www.law.northwestern.edu/lawreview/Colloquy/2009/28/LRColl2009n28Lund.pdf>.

34. 508 U.S. 520, 523–24 (1993).

35. *Id.* at 535–38.

36. *Id.* at 532 (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”).



discrimination.<sup>37</sup>

Not only has the Court extended significant protection to believers under general constitutional principles like these, but also it has denied protection to religious groups under special provisions.<sup>38</sup> For several decades—during the '60s, '70s, and '80s, roughly—the Court purported to extend free exercise protection to believers whose practices were substantially burdened by general laws.<sup>39</sup> Yet, as many commentators have observed, religious actors rarely prevailed.<sup>40</sup> Aside from unemployment benefits cases like *Sherbert v. Verner*, free exercise claimants won only one case, in which Amish parents sought to control their children's educations despite truancy laws.<sup>41</sup> Otherwise, distinctive constitutional protection proved useless in case after case.<sup>42</sup>

Establishment Clause cases are more difficult to assimilate to the model. On the one hand, the Establishment Clause could be understood to treat religion in a special way—but unfavorably. Consider *Town of Greece v. Galloway*, the legislative prayer case that is pending before the Supreme Court. When the lower court struck down the town's prayer scheme, it singled out one type of government speech for a prohibition that would not have been imposed on any secular message.<sup>43</sup> In the Establishment Clause

37. Cf. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 52 (2007) (arguing that although the Constitution should not treat religion with special solicitude, it can and must protect religious actors from government "hostility and neglect"). It is possible to think of the ban on discrimination on the basis of religion as grounded in equal protection rather than the First Amendment. See Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 911–20 (2013); Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 275 (2006).

38. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Lyng v. Northwest Indian CPA*, 485 U.S. 439 (1988).

39. The leading case that articulated this approach is *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

40. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111, 1127 (1990); James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992) ("[T]he free exercise claimant, both in the Supreme Court and the courts of appeals, rarely succeeded under the compelling interest test.").

41. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

42. See, e.g., *Lyng*, at 485 U.S. at 448–49; *Goldman*, 475 U.S. at 509–10; *Lee*, 455 U.S. at 259–60.

43. *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2d Cir. 2011), cert. granted, 133 S. Ct. 2388

area, in other words, special treatment for religion does not promote religious freedom in any straightforward way.<sup>44</sup>

Outside the courts, similar mismatches are commonplace. Congress and the Obama Administration have extended significant exemptions from the contraception mandate only to religious groups,<sup>45</sup> and yet those protections fall short of what many religious actors demand.<sup>46</sup> On the other hand, many of the most significant and effective protections for religious individuals and organizations are available generally, such as the tax exemption for charitable nonprofits<sup>47</sup> and exemptions for medical service providers who object to contraception or abortion.<sup>48</sup>

My conclusion from these examples is that the end of religious freedom, taken for now to mean the end of special constitutional solicitude, need not entail weaker protection for religious actors. Rather, the relationship between constitutional distinctiveness and constitutional protection is more complicated. Whether individual believers and their organizations will win particular disputes depends more on the application of lower-level commitments, such as bans on viewpoint discrimination and principles of expressive association, than on abstract debates over whether religion enjoys

(2013).

44. Of course, it is possible to argue that separationism does more to protect religious practice than to stifle it. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 698–99 (2005) (Breyer, J., concurring). Moreover, I have recently argued that the prohibition on religious endorsement in government speech is not as unusual as many people assume—many other types of government speech are in fact restricted by constitutional principles. *See* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 654–57 (2013) [hereinafter Tebbe, *Nonendorsement*]. I caution, however, that limitations on government endorsement of religion continue to be distinctive in some respects. *Id.* at 711–12.

45. *See, e.g.*, Laycock, *Culture Wars*, *supra* note 2, at 123–25 (discussing the Obama Administration’s rule on contraception).

46. *See id.* at 1 (arguing that the Obama Administration’s rules on contraception “offer very substantial protection to religious institutions, and they are likely to satisfy most judges. Religious institutions should claim victory or perhaps seek to negotiate minor adjustments” but noting that the rules concerning for-profit employers present a closer case).

47. *See, e.g.*, *Walz v. Tax Comm’n*, 397 U.S. 664, 680 (1970) (upholding a property tax exemption that included land owned by religious organizations for religious worship).

48. *See, e.g.*, 42 U.S.C.A. § 300a-7(b) (2000) (protecting the ability of medical providers who receive public funds to refuse to perform, assist with, or make facilities available for, abortions if doing so is contrary to “religious beliefs or moral convictions”); 45 C.F.R. § 88, 73 Fed. Reg. 78072, 2008 WL 9742178 (2008) (HHS final regulations implementing “federal healthcare conscience protection statutes”).

a unique place in American constitutionalism. Even more centrally, it depends on political and social dynamics that I will discuss below. Much the same can be said for the worry over incoherence or irrationality in religious freedom decisions, as it turns out.

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A second concern that contributes to the diagnosis of an end to religious freedom is that court opinions and other constitutional decisions on the subject are increasingly and irredeemably incoherent.<sup>49</sup> That is largely because the internal logic of religious freedom began historically with theological justifications that slowly gave way to secular rationales. But without its theological tenets, religious freedom lacked a coherent logic. That paradox has led to a jurisprudence of religious freedom that is at war with itself, that results in decisions that seem illogical without a theological underpinning, and that therefore is vulnerable to attack and even elimination.<sup>50</sup>

In other work, Smith has offered Kent Greenawalt's writing as an example of the troubled state of the dominant discourse on religious freedom.<sup>51</sup> Greenawalt maintains that plural values count in religion clause jurisprudence, and that these values are not reducible to a master commitment such as equality or separationism.<sup>52</sup> But Smith thinks that managing multiple secular values is not possible in religious freedom cases without ultimate resort to reasoning that is conclusory or tantamount to *ipse dixitism*.<sup>53</sup> Greenawalt skillfully considers many arguments for and against a particular outcome in a given scenario, but ultimately he simply chooses among them without giving a rationale.<sup>54</sup> Again, Smith thinks this type of reasoning is not really the fault of Greenawalt, whose skill is beyond

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49. See Smith, *The Last Chapter?*, *supra* note 1, at 925–26.

50. See *id.* at 911 (calling rationales for religious freedom “shaky” and “hardly . . . stable and secure”); *id.* at 923 (suggesting that Supreme Court decisions in the area have been “notoriously erratic (or, some might say, unprincipled)”; *id.* at 924 (diagnosing “flagrant inconsistency in adhering to announced doctrines”).

51. See Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1893 (2009) [hereinafter Smith, *Discourse*] (reviewing 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS).

52. 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 1–15 (2008).

53. See Smith, *Discourse*, *supra* note 51, at 1905–06.

54. See *id.* at 1870–72.

question, and more a symptom of the deep incoherence that characterizes religious freedom discourse.<sup>55</sup>

But does resolving actual disputes really involve conclusoriness, or just complexity? And if the latter, is there any available methodology that would eliminate it? Consider some of Smith's examples of places where reason fails. Probably his leading exhibit is Greenawalt's discussion of *Good News Club*.<sup>56</sup> One of the equal access cases, that decision required a school to allow a Christian club for children to meet directly after school and in the building just like other clubs and community groups.<sup>57</sup> The Court found that excluding religious groups constituted viewpoint discrimination and therefore violated the Free Speech Clause.<sup>58</sup> Greenawalt criticizes *Good News Club*. He argues that it differs from earlier cases because it involved young children who were more vulnerable to school endorsement of religion, because Good News Club was an outside group that sought to evangelize, and because the meetings took place immediately after school.<sup>59</sup> Combined, these features made it reasonable for school officials to worry that children would perceive official approval of the group, particularly if their peers were attending in large numbers, and that children might be unduly influenced to prevail on parents to allow them to join the club.<sup>60</sup>

Smith calls Greenawalt's conclusion a "bald pronouncement[]"—or a statement that "at least look[s] like" a bald pronouncement.<sup>61</sup> It exemplifies the conclusory reasoning that is symptomatic of the deteriorated state of legal discourse on religious freedom.<sup>62</sup> But is it really bankrupt? Not only does Greenawalt offer reasons for his conclusion, but those reasons implement his articulated commitments of principle.<sup>63</sup> One of those is

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55. See *id.* at 1905–06 ("Greenawalt's default on the level of justification is not so much an individual failure. Rather, it is a reflection of the current condition of the tradition."); see also *id.* at 1893 (softening his earlier indictment of Greenawalt's prescriptions).

56. See *id.* at 1893. Elsewhere, I discuss Greenawalt's treatment of this case in a different context. Nelson Tebbe, *Eclecticism*, 25 CONST. COMMENT. 317, 318–19 (2008) [hereinafter Tebbe, *Eclecticism*].

57. *Good News Club v. Milford Cent. Sch.* 533 U.S. 98, 111–12 (2001).

58. *Id.* at 107.

59. 2 GREENAWALT, *supra* note 52, at 206.

60. *Id.*

61. Smith, *Discourse*, *supra* note 51, at 1893.

62. *Id.* at 1905–06.

63. See 2 GREENAWALT, *supra* note 52, at 6–13 (identifying and describing a group of basic

concern for individual autonomy.<sup>64</sup> Government violates that principle whenever it interferes with individual choice around religion by influencing individual choice in favor of a particular religion, all religion, or no religion.<sup>65</sup> Undue influence over young children could well frustrate that value. Now, Greenawalt does not explicitly invoke a principle of individual autonomy in his discussion of *Good News Club*,<sup>66</sup> but its involvement is impossible to miss, given the theoretical framework that he articulates at the outset. So his conclusion is supported not only by reasons, but by principled ones.

My point here is not that conclusoriness or contradiction are entirely absent from religious freedom scholarship—it would be foolish to say that—but rather that they may not be as common as suggested. There are other examples for which the concern seems stronger. Take for instance *Lee v. Weisman*, where the Court struck down a graduation prayer at a public high school.<sup>67</sup> Greenawalt thinks this is a difficult case because, on the one hand, religious students and officials wish to dignify an important rite of passage by invoking their deity while, on the other hand, dissenting members of the school community may feel coerced into observance because attendance at graduation is often understood to be mandatory.<sup>68</sup> After making several additional points, Greenawalt concludes that the Court probably was correct to disallow the prayer out of concern for the principle that government may not sponsor religion, but he expresses “regret” about that conclusion.<sup>69</sup> In a follow-up article, Greenawalt offers his analysis of *Lee v. Weisman* as an example of genuine value conflict.<sup>70</sup> He himself believes that in such cases reasons run out—that all he can say to justify his judgment is that the reasons supporting the Court’s decision seem to him to be stronger than the reasons cutting against it.<sup>71</sup>

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Establishment Clause values).

64. *See id.* at 9.

65. *Id.* at 9.

66. *See id.* at 206.

67. 505 U.S. 577, 577 (1992).

68. GREENAWALT, *supra* note 52, at 112.

69. *Id.* at 115.

70. Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1144 (2010).

71. *Id.*

Whether Greenawalt's discussion of this case involves genuine irrationality or *ipse dixit* reasoning is a deep issue that I am addressing in longer-format work.<sup>72</sup> Here I raise two more immediate questions. First, does the difficulty of *Lee v. Weisman* really suggest an impoverished discourse, bereft of coherent foundations, or does it simply reflect a hard case? It is interesting to consider whether theological treatments, which are sometimes imagined to provide a firmer foundation for religious freedom jurisprudence, would actually be any more straightforward in such a case. Surely, at least some religious philosophies would care not just about the desires of Christian students to solemnize their graduation ceremony, but also about the concerns of students who identify with dissenting sects of Christianity, other religions, or even nonbelieving orientations. Such diversity among theologies, and complexity within them, are deemphasized by general references to "traditional religion."<sup>73</sup> Has there ever existed a historical period in which views were united about questions of the proper relationship between religion and government? More likely, there have always been hard cases, and always will be. If that is right, then their persistence need not indicate a degenerate discourse.

Second, are hard cases really more prevalent in the area of religious freedom, as compared to other constitutional domains governed by open-ended provisions like freedom of speech, equal protection, due process, the Eighth Amendment, or the Fourth Amendment? To know for certain would require a systematic, comparative study. Beginning a law review article with the formula "the law of [area X] is in utter disarray" is as commonplace in other areas of law as it is in this one, it seems. A possible conclusion is that all of American constitutional doctrine is bankrupt—because overly political, undemocratic, elitist, or unpredictable—but even if that were the case it does little to support any *particular* impoverishment of religious freedom doctrine because of specific internal or external developments.

So what exactly is at stake in claims that constitutional decision-making on questions of religious freedom is doomed to achieve only *modus vivendi* solutions but never principled ones? A close reading of Smith suggests three more particular worries: that constitutional actors are biased in favor of

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72. See Nelson Tebbe, *Religion and Social Constitutionalism* (unpublished manuscript).

73. See, e.g., Smith, *The Last Chapter?*, *supra* note 1, at 919 (referring to "traditional religion" and "traditional faiths").

outcomes that disfavor traditional religion,<sup>74</sup> that they are elitist in the sense of being disconnected from majoritarian beliefs,<sup>75</sup> and that they will make decisions that erode the rule of law because they are arbitrary.<sup>76</sup> Those charges deserve more detailed responses than I can give in this short essay. But, again, it is worth considering whether they disproportionately characterize religious freedom jurisprudence—as compared to other areas of constitutional law—and whether any imagined jurisprudence, theological or otherwise, could root them out. Social and political forces will work on constitutional actors in this area just as they do in others, although of course not in exactly the same way.<sup>77</sup> Comparing those dynamics should shape our research agendas.

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Third and finally, there is the concern that American government is being overtaken by an orthodoxy of liberal egalitarianism that will fail to protect adherents of traditional religion. Here is how the argument runs: because many traditional religions teach that their own beliefs are true, while others are mistaken, they inevitably come into conflict with liberal egalitarianism, which insists that government owes all its citizens equal respect.<sup>78</sup> Traditional religion and today's liberalism therefore are seen to be “fundamentally incompatible.”<sup>79</sup>

Opposition to orthodoxy is of course a central liberal tenet—perhaps *the* central tenet—so the charge here is one of inconsistency as well as simple

74. See, e.g., Smith, *The Last Chapter?*, *supra* note 1, at 925–26 (noting that “flagrant inconsistency” in court decisions displeases adherents of traditional religion in part because “they often lose particular battles”). Elsewhere, Smith notes that Greenawalt’s ostensibly principled method usually generates outcomes that favor the progressive side of the debate. See Smith, *Discourse*, *supra* note 51, at 1890–91.

75. See Smith, *Discourse*, *supra* note 51, at 1900. After noting that Washington, Jefferson, and Lincoln all violated the rule against government pronouncements on religious truth, Smith asks whether perhaps more recent history supports the rule: “But tradition is an evolving matter, and in our more secular and diverse society, we understand that such expressions are divisive and inappropriate. Don’t we? Well, actually, no: we don’t—not unless the ‘we’ is understood to refer to a smaller and more select fellowship (like, say, devout readers of the *New York Times*?).” *Id.*

76. See, e.g., *id.* at 1871 (“What the tradition desperately needs, it seems, is . . . a careful, systematic demonstration that controversies over religious freedom can actually be resolved through ‘reasoned analysis, as distinguished from rhetoric.’”) (internal citation omitted).

77. Smith and I largely agree on this point, to which I will return at the end of this Response.

78. Smith, *The Last Chapter?*, *supra* note 1, at 921.

79. *Id.* at 919.

injustice. It is also entirely familiar. It is a version of the classic question of how liberal governments ought to treat illiberal citizens or communities. Liberal theory has given answers, but the key issue here is not whether those answers are convincing, but whether the actual practice of American government is justifiable under any of them. Whatever the answer in theory, according to Smith, traditional believers have reason to worry that liberal orthodoxy has little room for them.<sup>80</sup> Richard Garnett similarly believes there is a real risk that political forces on the question of gay marriage will come to view religious believers as minorities, and not the type of minorities deserving of individual rights against the majority but as outliers whose views are unworthy of respect.<sup>81</sup>

Are these fears justified? Has American liberalism become so muscular that it actually has morphed into nearly its opposite—an intolerant form of government that brooks no dissent? So far, it does not seem that anyone is claiming that much. Rather, scholars are warning of that possibility, should developments continue in the direction they have been moving.<sup>82</sup> Certain cases are troubling to them, such as *CLS v. Martinez*. John Inazu highlights that case and argues for stronger protection for group pluralism out of a skepticism for “state orthodoxy.”<sup>83</sup> Yet he is not arguing that we have reached that point.<sup>84</sup> Countervailing cases such as *Hosanna-Tabor* are comforting indicators to traditional believers that they will continue to be protected, even when they engage in illiberal behavior, especially when those decisions are unanimous.<sup>85</sup> At worst, for people who worry about liberal orthodoxy, the doctrine is in tension with itself.

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80. Smith, *The Last Chapter?*, *supra* note 1, at 923 (“Once secular egalitarianism is accepted and entrenched as the prevailing orthodoxy, how much sympathy or toleration can [religious believers] expect over the long run to receive from their new and puritanically egalitarian secular masters?”).

81. Richard W. Garnett, *Worth Worrying About? Same-Sex Marriage and Religious Freedom*, COMMONWEAL (Aug. 5, 2013, 3:35 PM), <https://www.commonwealmagazine.org/worth-worrying-about>.

82. See *infra* notes 83–84, 93–101 and accompanying text.

83. John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. (forthcoming 2014).

84. See *id.*

85. Smith, *The Last Chapter?*, *supra* note 1, at 929–32 (addressing *Hosanna-Tabor*); cf. Inazu, *supra* note 83, at 40–43 (discussing *Hosanna-Tabor* and arguing that the decision would have been more firmly grounded in a general right to associate that would protect all groups, secular and sacred).



Perhaps a more difficult area for traditional believers would be the Establishment Clause, which seems to expressly disfavor public endorsements of religious views even while governments remain free to embrace secular or liberal perspectives.<sup>86</sup> This disparity could be seen as constitutional enforcement of secular orthodoxy in the context of government expression. One response is that religion actually is not all that exceptional in this regard.<sup>87</sup> I have recently argued that in fact the Constitution limits government endorsement of ideas not only with respect to religion, but for other topics as well.<sup>88</sup> Racialized speech and electioneering, for example, are also prohibited, and several other endorsements face similar constitutional restrictions grounded in various provisions including the Equal Protection Clause, the Due Process Clause, and the Free Speech Clause itself. So religion is not singled out here: government can still engage in much religious speech, and where it cannot there often exist analogous secular barriers.

Another response is that the Court, if anything, seems to be moving in the direction of allowing more religious speech by the government, not less. In particular, the Justices have relied on standing doctrine to take the courts out of the business of enforcing restrictions on government endorsement of religion.<sup>89</sup> At the moment, the Court seems poised to further weaken nonestablishment barriers on government speech, now in the context of legislative prayer.<sup>90</sup> With the departure of Justice O'Connor, who was the chief architect of the rule against religious endorsements,<sup>91</sup> and with the arrival in her stead of Justice Alito, who shows little affinity for that

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86. See *supra* notes 43–44 and accompanying text.

87. See Tebbe, *Nonendorsement*, *supra* note 44, at 648–50.

88. *Id.*

89. See, e.g., *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007) (dismissing a challenge to agency action promoting President Bush's "faith-based initiatives" on standing grounds); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (dismissing a challenge to recitation of the Pledge of Allegiance in schools on standing grounds). See generally Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN'S L. REV. 407 (2011) (embracing these decisions as embodiments of a salutary move toward "soft constitutionalism").

90. See *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (2013).

91. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 687–88, 690–91 (1984) (O'Connor, J., concurring).

principle,<sup>92</sup> the Court may well move further in that direction, this time using substantive doctrine rather than procedural mechanisms. So Establishment Clause law, which might seem like a natural focus for concern over liberal orthodoxy, actually cuts the other way.

Nevertheless, alarm bells over liberal dominance do seem to be sounding more loudly and more frequently of late.<sup>93</sup> Perhaps that is because of a perception that the “culture wars” are coming to a close, and that progressives have won. Two fronts of that conflict do seem to be moving decisively against advocates for traditional religion. Rights for LGBT people are coming to be recognized at a rapid rate, not only in the area of marriage for same-sex couples, but somewhat more generally as well.<sup>94</sup> Insistence on health insurance coverage for female contraceptives by the Obama Administration is perhaps another indicator, although that fight is only now reaching the Supreme Court.<sup>95</sup> Increasing recognition for nonbelievers has been cited as another area of advance for progressive forces.<sup>96</sup> As Smith says, however, it is far too soon for progressives to declare victory.<sup>97</sup> I have already mentioned Americans’ increasing tolerance for government expression of religious ideas, and on topics like reproductive freedom, the results are far more mixed.<sup>98</sup> Still, there does seem to be a sense among traditional religious believers that they have come to occupy a minority position on several such questions.<sup>99</sup>

That sense does much to explain the recent prevalence of a discourse of minority rights, antidiscrimination, and anti-orthodoxy among those concerned with the plight of so-called traditional religions. Oftentimes, that

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92. See, e.g., *Salazar v. Buono*, 559 U.S. 700, 723, 728 (2010) (Alito, J., concurring in part) (expressing skepticism about the “so-called ‘endorsement test’”).

93. See *supra* notes 78–81 and accompanying text.

94. See generally MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2012) (describing the extraordinarily rapid rise of the gay rights movement).

95. See *Sebelius v. Hobby Lobby Stores, Inc.*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

96. Laycock, *Sex, Atheism*, *supra* note 2, at 419–20.

97. Smith, *The Last Chapter?*, *supra* note 1, at 932 (noting that the debate “bids to continue for some time to come”).

98. See *supra* notes 86–92 and accompanying text.

99. See, e.g., Douglas Nejaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, 323–25 (2009).

discourse deploys the language of religious freedom, yet just as often it invokes universal guarantees such as free speech, equal citizenship, and freedom of association in order to remind liberals and progressives that their commitments to those principles should not only protect themselves when they are in the minority, but also more traditional citizens when political fortunes are reversed.<sup>100</sup> This is not to say that warnings about liberal orthodoxy are not sincere and powerful. Rather, the point is that this language is exactly what you would expect to see in a constitutional democracy when a group finds itself newly or differently embattled. Smith is right to say that whether such arguments prevail will depend as much on political and social dynamics as on their legal authority.<sup>101</sup>

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Smith closes by predicting—albeit tentatively and conditionally—that the fortunes of religious freedom as a legal doctrine will depend on the fortunes of “the church” in politics and society.<sup>102</sup> If and only if “the church” continues to thrive in American society will religious freedom continue to be protected vigorously.<sup>103</sup> Many questions surround this claim, including whether it makes sense to speak of “the church” when Christian faiths proliferate, something Smith discusses;<sup>104</sup> how other organized religions fit into this conception; whether it might make more sense to link the fortunes of religious freedom to the health and prevalence of religious practice in America rather than to institutionalized faith; whether the new prominence of nonbelievers weakens or strengthens religious freedom, and so forth. Yet Smith’s fundamental argument is convincing—that the health of religious freedom in constitutional practice will likely be closely linked to the fortunes of religion in wider social and political dynamics.

Those dynamics include not only general demographic trends, such as the percentage of Americans who affiliate with religious organizations or who regularly attend worship services.<sup>105</sup> They also feature perceptions of

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100. See Smith, *The Last Chapter?*, *supra* note 1, at 920–21.

101. See *id.*

102. *Id.* at 128.

103. *Id.*

104. *Id.*

105. See generally, e.g., ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 129 (2012) (demonstrating, inter alia, the increased disaffiliation of Americans from organized religion, partly in response to the gay rights movement).

religion and of religious freedom that emerge from controversies over marriage between people of the same sex,<sup>106</sup> equality of opportunity for LGBT people in employment and schooling,<sup>107</sup> health insurance coverage for employees under the contraception mandate,<sup>108</sup> exclusion from membership by faith-based student groups on university campuses,<sup>109</sup> and so forth. Views on these disputes—and on the *constitutional* questions implicated in them—will be influenced by grassroots religious groups, by the social movement for LGBT rights, by media coverage, by positions taken by political parties, by local and state governments, and of course by arguments made in Congress and by executive branch officials including the President. Outcomes of religious freedom disputes that make it to the courts will depend in large measure on convictions formed in the context of these wider political and social debates.

Yet the persuasiveness of this observation sits in some tension with worry over the state of the doctrine.<sup>110</sup> Will outcomes really turn on whether constitutional actors continue to place religion in its own constitutional category? Even if religion ceases to be special as a matter of constitutional doctrine, there are plenty of legal resources that will continue to be available to protect religious observance, as argued above.<sup>111</sup> Social forces will drive legal outcomes to a significant degree regardless of whether religion

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106. See, e.g., Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES (Nov. 14, 2008), [http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?pagewanted=all&_r=0) (reporting on the role of the Mormon Church in passing Proposition 8, the ballot initiative that amended the California constitution to prohibit marriage between people of the same sex).

107. See, e.g., Stephanie Francis Ward, *For Young People, Transgender Life Means Stress and Confusion over Restrooms, Sports and Harassment*, ABA J., Oct. 2013, available at [http://www.abajournal.com/magazine/article/a\\_gender\\_change\\_at\\_a\\_tender\\_age/](http://www.abajournal.com/magazine/article/a_gender_change_at_a_tender_age/) (reporting on religious freedom challenges to a Massachusetts law that protects transgender people in employment and education).

108. At present, the leading examples, of course, are the challenges by for-profit corporations to the regulation requiring them to provide health insurance coverage for contraception. *Sebelius v. Hobby Lobby Stores, Inc.*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); *Conestoga Woods Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

109. See, e.g., *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010) (upholding a decision by a public university to deny official recognition to a Christian student group that excluded members who did not adhere to its policies on sexual morality).

110. See *supra* notes 49–77 and accompanying text.

111. See *supra* notes 49–77 and accompanying text.

continues to be viewed as constitutionally special. To be sure, doctrinal and social developments likely will move together, so that decline in the specialness of religion will accompany decline of social regard for religion. That seems to be Smith's point at the end, and it is well taken. But that argument also calls into question whether lawyerly and academic arguments against the constitutional specialness of religion are the primary drivers of actual outcomes in legal disputes.

Similar questions surround claims about the confusions and contradictions of religious freedom doctrine.<sup>112</sup> If social and political influences are largely responsible for the broad pattern of outcomes in court cases, then we should be less concerned about the state of the doctrine, except as a symptom of those broader dynamics. Confused holdings will not necessarily herald weaker protection for religious actors. That is not to say that legal arguments about the meaning of the Constitution have no influence on politics and society. Causation works in both directions. But mutual influence is a matter of degree, and if Smith is right that the principal causes are extralegal, then the stakes of debates over doctrinal matters—such as the specialness of religion or the weakness of constitutional rules as predictors—could be low.

My conclusion is not that debates over constitutional theory and political morality do not matter—again, low stakes is not the same as no stakes—but instead that they have limited impact on outcomes. Concerns over the health of religious freedom as a concept may well resonate with broader conversations that Americans are having in the context of specific cases like the constitutionality of the contraception mandate or the impact of same-sex marriage on communities of faith. However, component concerns over the specialness of religion or the muddled state of the doctrine may turn out to be, if not entirely epiphenomenal, then weak influences on the fate of the concept of religious freedom among Americans.

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112. See *supra* notes 49–77 and accompanying text.