

5-15-2014

Response: Situating Ourselves In History

Steven D. Smith

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Steven D. Smith *Response: Situating Ourselves In History*, 41 Pepp. L. Rev. 983 (2013)
Available at: <http://digitalcommons.pepperdine.edu/plr/vol41/iss5/5>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

Response: Situating Ourselves in History

Steven D. Smith*

On the verge of the new millennium, the eminent historian Jacques Barzun, possibly the most learned person then alive, observed that as the twentieth century was winding down “[a] wider and deeper scrutiny is needed to see that in the West the culture of the last 500 years is ending at the same time.”¹ “[T]he culture,” Barzun lamented, “is old and unraveling.”² Over the last centuries, the West “has offered the world a set of ideas and institutions not found earlier or elsewhere.” In developing these “ideas and institutions,” however, the West “has pursued characteristic purposes . . . and now these purposes . . . are bringing about its demise.”³

There is, to be sure, much to question in Barzun’s elegy, and to quarrel with—its air of fatalism, for one thing. Arnold Toynbee, another historian of massive erudition and morose disposition, cautioned that history, while exhibiting discernible recurring patterns, is not ultimately deterministic.⁴ In addition, it is perilous to try to discern our own place in the broad panorama of history. With our faces pressed against the canvas, how can we see the whole picture? Thus, the annals are replete with people who mistakenly believed they were living on the brink of the apocalypse (and also of people who erroneously expected to see the Millennium—the one where lions eat grass and lie down with lambs—or some secular variant thereof).

And yet . . . looking backward, we can perceive that for all the incorrigible unruliness of history, and all the divergent interpretations, there have been periods about which we can say, with some assurance, that things

* Co-Executive Director for the Institutes of Law & Religion and Law & Philosophy and Warren Distinguished Professor of Law, University of San Diego School of Law.

1. JACQUES BARZUN, *FROM DAWN TO DECADENCE: 1500 TO THE PRESENT* ix (2000).

2. *Id.* at xiii.

3. *Id.* at xv.

4. ARNOLD J. TOYNBEE, *A STUDY OF HISTORY: RECONSIDERATIONS* 518 (1961) (asserting that “patterns in the course of human affairs are not predetermined or inevitable”).

were not just the usual “one damn thing after another” (as Winston Churchill supposedly said): rather, a culture or civilization *was* in a condition of decline or collapse while another and different kind of culture was emerging (and not for better). And sometimes people living in these times of decline had a sense of their situation. The fourth and fifth centuries in the Roman Empire were such a period: and most students of history have not regarded the consequences—the short term consequences, at least (“short term” in this context meaning something like the next several centuries)—as happy ones.⁵ The fifteenth and sixteenth centuries in Western Europe were another such period, and again the short term consequences (“short term” now meaning a century, give or take) were uncomfortable: the French Wars of Religion, the Thirty Years War.⁶ It may be, as Barzun and others have thought,⁷ that we are in the midst of another such period of major transformation, and that there are “signs of the times” to suggest as much. If so, that fact presumably ought to affect our interpretations of the events and trends of our own time.

I indulge in these reflections only because they may help to illuminate the important but elusive differences between the views and interpretations presented in my Brandeis lecture and in *The Rise and Decline of American Religious Freedom* and those expressed in the comments by Professors Koppelman, Tebbe, and Horwitz. Any author would be gratified to be blessed with such perceptive, knowledgeable, and also charitable critics.⁸ Their comments raise a host of important particular questions and challenges; I could not possibly address all or even very many of these in a

5. See, e.g., BRYAN WARD-PERKINS, *THE FALL OF ROME AND THE END OF CIVILIZATION* (2005) (responding vigorously and critically to revisionist and more benign interpretations of the fall of the Roman Empire).

6. Critics differ in their assessments of the longer-term consequences. For the most part, the modern view has been that the change was a good one. *But see* BRAD GREGORY, *THE UNINTENDED REFORMATION* (2012).

7. See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION* 39 (1983) (asserting that “the historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse”). A more grandiose version of this narrative of decline came from sociologist PITIRIM SOROKIN, *THE CRISIS OF OUR AGE* (1941). And of course there is OSWALD SPENGLER, *THE DECLINE OF THE WEST* (1918 - 1923).

8. Although critical, all three commentators are generous—more generous than I deserve, I am afraid. And I have surely learned as much from them as they have from me. As it happens, Paul Horwitz is not the first to describe me as a conservative or religious “crit.” I associate Critical Legal Studies with a time when legal scholarship was more probing and alive than it has since become, and so I humbly accept this designation—so long, that is, as I am not called upon to explain Gramsci, Hegel, the early Marx, Derrida, or deconstruction.

brief Response. And in any case, taking the arguments one-by-one, I am inclined to agree with more in the comments than I disagree with. And yet it seems clear that the commentators mean to be critical (even if respectfully critical), and that their views and mine are far from being in alignment. How then to explain our simultaneous agreements and divergences?

One major difference, it seems, is not so much of substance as of *tone*, or perhaps *attitude*. Koppelman and Tebbe accept large parts of my diagnosis of difficulties in modern religion clause jurisprudence, but they are puzzled that I find these difficulties so worrisome. Thus, Koppelman admits that rejection of special protection for religious freedom has achieved “hegemonic” status among legal academics,⁹ but he doubts that this view is widely shared in the general population. Our failures on the level of theory need not translate into lack of protection in practice; there is thus no warrant for the “gloom”¹⁰ expressed in the book. Tebbe argues that if religious freedom comes to lose its special status in constitutional law, religious actors may nonetheless be almost as fully protected, or possibly even better protected, by other constitutional rights and doctrines—free speech and equal protection, for example.¹¹

I can grant these points and still wonder at the easy cheerfulness of these responses. But different attitudes—my “gloom” and Koppelman’s characteristic and enviable optimism, for example—may be explicable against the backdrop of different implicit background historical narratives.¹² If your implicit historical picture is of “business-as-usual,” or better yet of reliably predictable even if uneven progress,¹³ then a judicial debacle or a

9. Andrew Koppelman, *Theorists, Get Over Yourselves: A Response to Steven D. Smith*, 41 PEPP. L. REV. 937, 938 (2014).

10. *Id.* at 944.

11. Nelson Tebbe, *The End of Religious Freedom: What is at Stake?*, 41 PEPP. L. REV. 963, 970 (2014).

12. On the influence of often implicit historical narratives, see CHRISTIAN SMITH, MORAL, BELIEVING ANIMALS 63–94 (2003). On the importance of background as opposed to foreground factors, see Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997).

13. Both these comments and their work in general suggest the influence on Koppelman and Tebbe of a narrative that has been powerfully influential especially in the academy and that we might call “the Enlightenment story.” This is a grand historical narrative that tells how, beginning perhaps around the fifteenth century and then gathering momentum in the seventeenth and eighteenth centuries, something called “Reason” emerged and began to push back the darkness of Tradition and Superstition that had prevailed since Late Antiquity. The breakthrough of Reason portended a course of Progress in the governance of humankind: it could be anticipated that humans

theoretical embarrassment here and there are regrettable but not especially alarming. Win a few, lose a few. Such is life. Things may be in disarray at the moment, but there is a good chance that next year will be better.

Conversely, if you perceive that our culture seems to be in the midst of a major transformation, and if you also believe that a commitment to religious freedom has been one of the defining “ideas and institutions” mentioned by Barzun that has been central to a distinctive Western civilization that now shows signs of “unraveling,” things look different. The erosion of that commitment together with a “hegemonic” view among academics that the commitment is no longer defensible may seem more momentous—momentous in its own right and also as symptomatic of a larger and potentially worrisome change in which the center can no longer hold.¹⁴ By the same token, you can agree with Tebbe (as I do) that “social and political dynamics”¹⁵ will ultimately count for more than constitutional decisions and doctrines, and yet worry about academic and judicial developments precisely because these are one important indicator of the direction in which such dynamics seem to be carrying us (and also because, beyond their immediate practical consequences, the doctrines and decisions are among the important shapers of “social and political dynamics”).

Paul Horwitz comments explicitly on the difference in attitudes. He

would become progressively more free from want, oppression, and prejudice. On the influence of the Enlightenment story, see Smith, *supra* note 12, at 71. Some might think that the horrific events of the twentieth century would have decisively discredited this story. And yet the story is tenacious: its central themes—reason, progress, suspicion of tradition, a propensity to classify opposition under the heading of “prejudice”—remain pervasive, especially among those who like to call themselves, revealingly, “progressives.”

14. Actually, even without supposing any sort of major historical transition, Koppelman’s complacency about the consequences of academic opinion seems to me unwarranted. He notes Keynes’ observation about the long-term consequences of ideas, Koppelman, *supra* note 9, at 944; that observation seems pertinent in this context. As an analogy, the Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), invalidating a law prohibiting homosexual conduct, might plausibly be seen as ratifying the academic consensus that had come to prevail four decades earlier in association with the celebrated Hart-Devlin debate (a debate that flourished, perhaps not coincidentally, when Anthony Kennedy, author-to-be of the majority opinion in *Lawrence*, was a law student). See ROBERT GEORGE, MAKING MEN MORAL 49 (1993) (observing that “[m]any, . . . perhaps even most, think that Hart carried the day . . .”). Similarly, if it comes to be widely accepted in the legal academy that special constitutional treatment for religion is unjustified, odds are that this consensus sooner or later will manifest itself in positive law as well. This is a point, to be sure, about the long term influence of academic opinion, not about the efficacy of theorizing itself: one can acknowledge the likely force of an academic consensus even while doubting (as I do, in both of these instances) the cogency of the theorizing that ostensibly supports that consensus.

15. Tebbe, *supra* note 11, at 980.

thinks that while acknowledging the shortcomings and intermittent tragedies of the “American settlement” that prevailed in the nineteenth- and early twentieth-centuries, I nonetheless seem “optimistic” about the earlier arrangement and “pessimistic” about our present situation. Horwitz, conversely, while acknowledging current problems, would mostly reverse these valuations: to him, “things look pretty damn good” today, at least by contrast to earlier decades.¹⁶

As it happens, if we were just to consider, say, the years 1850 and 2000 as frozen moments extracted from the flow of history, I might be inclined to agree with Horwitz. I pick the year 2000, not 2014: even in the last few years, much has changed to affect and perhaps alter the comparative assessment. And that is the point: once again, if current events are viewed as indications of an ongoing shift to some significantly altered legal and cultural arrangement, our judgments may change.

But then why should we suppose that we are in the midst of some epochal transition to a very different and uncertain political future? Surely the say-so of a few curmudgeonly prophets like Barzun is not enough to go on (even acknowledging their erudition). Admitting that the attempt to situate ourselves in history and to discern its larger flow is inherently speculative, I offer four observations. These are contestable observations, to be sure, and although I believe they could be supported (and some of them are argued for more fully in the book), they are stated here in baldly conclusory form for your consideration.

First, the distinctive commitment to religious freedom as we have known it in America is to a large extent the product of Christian themes developed and implemented in the West over centuries within the framework of what has been, in its foundations and governing aspirations if only erratically in its practices, a Christian civilization.¹⁷

Second, as a matter both of history and of unfolding logic, the commitment to religious freedom has expanded or spilled over into support for other valued and overlapping rights, conveniently if loosely clustered around the First Amendment—freedom of conscience, freedom of thought, freedom of speech, freedom of association.

16. Paul Horwitz, *More “Vitiating Paradoxes”: A Response to Steven D. Smith*, 41 PEPP L. REV. 943, 952–53 (2014).

17. This claim is argued for at greater length in chapter 1 of the book. More generally, see the impressively erudite if oddly entitled DAVID BENTLEY HART, *ATHEIST DELUSIONS: THE CHRISTIAN REVOLUTION AND ITS FASHIONABLE ENEMIES* (2009).

Third, and consequently, the relinquishment of the distinctive commitment to religious freedom may undermine the foundations of these other rights as well. I understand that even someone who accepts my first and second observations might dispute this third claim. In his *Memorial and Remonstrance*, however, James Madison warned that if the right to religious freedom is not secure, then all other rights will be likewise imperilled.¹⁸ And more recent history offers some limited confirmation. Thus, with the benefit of two-plus centuries of additional experience, Rajeev Barghava reports that “states that fail to protect religious freedom usually trample on other freedoms too.”¹⁹ (To be sure, the matter is complex: correlation is not equivalent to causation.)

Fourth, modern judicial and academic discourse has almost wholly detached the constitutional protection for religious freedom from its Christian or Judeo-Christian sources and has ruled inadmissible the supporting theological rationales. And it is far from clear that secular substitutes can do the job. Consequently, Douglas Laycock reports that “scholars from all points on the spectrum now question whether there is any modern justification for religious liberty.”²⁰ At the same time, a movement of secular egalitarianism has arisen that is often openly antagonistic to traditional religion and hence to the traditional commitment to religious

18. The right to religious freedom, Madison argued, “is held by the same tenure with all our other rights. . . .”

Either, then, we must say that the will of the Legislature is the only measure of their authority, and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred.

JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), REPRINTED IN THE SACRED RIGHTS OF CONSCIENCE 309, 313 (Daniel L. Dreisbach & Mark David Hall eds. 2009).

19. RAJEEV BHARGAVA, REHABILITATING SECULARISM, IN RETHINKING SECULARISM 99 (Craig Calhoun et al. eds. 2011).

20. Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 DETROIT-MERCY L. REV. 407, 423 (2011). See, e.g., BRIAN LEITER, WHY TOLERATE RELIGION? (2012); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); Gemma Cornelissen, *Belief-Based Exemptions: Are Religious Beliefs Special?*, 25 RATIO JURIS 85 (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); James W. Nickel, *Who Needs Freedom of Religion?*, 76 COLO. L. REV. 941 (2005); Gidon Sapir & Daniel Statman, *Why Freedom of Religion Does Not Include Freedom from Religion*, 24 LAW & PHIL. 467–505 (2005).

freedom.²¹ As the spectacular advances of the campaign for same-sex marriage reflect, this movement begins to look like a sort of an impatient political juggernaut with the power to overwhelm pundits and professors and politicians (including some politicians who never stand for election), and to flatten both centuries-old understandings of vital institutions such as marriage as well as long-standing procedural commitments (such as the venerable notion that major constitutional issues ought to be decided forthrightly and in the context of live and disputed controversies, not through misdirection in feigned cases).²² Secular egalitarianism, like some contemporary *Spiritus Mundi*, slouches toward becoming a new and dominant secular orthodoxy,²³ muscling aside the centuries-old Christian one from which the commitment to religious freedom (and so much else²⁴) developed.

I submit that all of these observations are at least plausible, and that their conjunction supports an interpretation of current developments from a Barzunesque in contrast to either a “business-as-usual” or a “progressive”

21. See generally Laycock, *supra* note 20, at 412–15. See also Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. __ (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304427.

22. See *United States v. Windsor*, 133 S. Ct. 2675, 2698–700 (2013) (Scalia, J., dissenting); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2674–75 (2013).

23. Writing presciently a third of a century ago, the sociologist and political theorist Robert Nisbet observed the potential power of what he called “the New Equality.” ROBERT NISBET, *TWILIGHT OF AUTHORITY* 180–93 (1975). Nisbet argued that “[e]quality has a built-in revolutionary force lacking in such ideas as justice or liberty.”

Equality feeds on itself as no other single social value does. It is not long before it becomes more than a value. It takes on . . . all the overtones of redemptiveness and becomes a religious rather than a secular idea.

Id. at 184. Nisbet commented that

it would be hard to exaggerate the potential spiritual dynamic that lies in the idea of equality at the present time. One would have to go back to certain other ages, such as imperial Rome, in which Christianity was generated as a major historical force, or Western Europe of the Reformation, to find a theme endowed with as much unifying, mobilizing power, especially among intellectuals, as the idea of equality carries now.

Id. If Nisbet’s observations were broadly accurate in 1975, they seem even more apt today.

24. Cf. Hart, *supra* note 17, at 32–33 (“Even the most ardent secularists among us generally cling to notions of human rights, economic and social justice, providence for the indigent, legal equality, or basic human dignity that pre-Christian Western culture would have found not so much foolish as unintelligible. It is simply the case that we distant children of the pagans would not be able to believe in any of these things— they would never have occurred to us— had our ancestors not once believed that God is love, that charity is the foundation of all virtues, that all of us are equal before the eyes of God, that to fail to feed the hungry or care for the suffering is to sin against Christ, and that Christ laid down his life for the least of his brethren.”).

perspective. But I emphatically do not mean to lapse into any sort of historical fatalism. Much remains open and undecided. The egalitarian movement that looks so irresistible at the moment could turn out to be short-lived, as other “progressive” enthusiasms (such as eugenics, or prohibition) have sometimes done. Current decisions adverse to Christian photographers and bakers²⁵ could provoke a backlash, reversing trends (and perhaps creating new and different dangers). Religious revivals have occurred sporadically and unpredictably throughout American history; a new but no doubt different kind of revival might be in the offing. Any number of things could happen.

So the future of religious freedom remains very much in the balance. Views and conclusions will inevitably vary, as the perceptive comments by Professors Koppelman, Tebbe, and Horwitz demonstrate. All of this is natural and fitting. The one attitude that is not apt, I submit, is complacency.

25. See *Elane Photography v. Willcock*, 309 P.3d 53 (N.M. 2013); *Craig v. Masterpiece Cakeshop, Inc.*, CR 2013-0008 (Colo. Office of Admin. Cts. 2013) (initial decision).