McELROY LECTURE

Sex, Atheism, and the Free Exercise of Religion

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INTRODUCTION

Religious liberty is often controversial in specific application. But at least in the United States, it has long been popular in principle. It was not always so, and it may be changing back again. For 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.

I. THE HISTORIC DEBATE OVER RELIGIOUS LIBERTY

Let me start by briefly reviewing the debate from the last time religious liberty was at issue in principle. When the Reformation brought alleged heresy on a national and even continental scale, neither side was ready for religious liberty. Both Protestants and Catholics assumed that they were entitled, and obligated, to enforce their faith where they had the power to do so. The resulting persecutions and wars of religion consumed Europe at intervals through much of the sixteenth and seventeenth centuries.[1]

All this human suffering led sensible people to question the premise: Why not let each individual decide for himself about religion? First came the idea of toleration: the state would still designate the true church and support it in various ways, but the state and the true church would tolerate dissenters. The great American improvement on toleration was religious equality, and therefore, disestablishment. Rather than one official church that tolerated some or all of the others, religious liberty was recognized as a

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1. For a brief overview that collects many of the leading histories, see Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1049–66 (1996).

natural right, with equal rights for every church and every believer, and eventually, for every nonbeliever as well.

This was a long transition, and it required debate. Defenders of the old regime offered multiple reasons for state control of religion, but all the reasons had one thing in common: Religion is far too important to be left to individual choice.[2]

The first reason to enforce religious truth was to save souls. If there is one true faith whose believers will be saved, and many false faiths whose believers will be damned, then heretics need to be forced into the true faith—for their own good, and also to protect the innocents they might lead astray. Pope Pius IX famously said that liberty of conscience is the "*liberty of perdition*."[3] The idea can be traced back at least as far as St. Augustine.[4]

A second reason to enforce religious truth was social peace. The preamble to one of Henry VIII's statutes recited that unity in opinions ever leads to "quiet assurance, prosperous increase, and other innumerable commodities . . . ."[5] But religious disagreement leads to "manifold perils, dangers, and inconveniences."[6] Henry's solution was that that all England should believe what he believed. This statute was entitled "An Act Abolishing Diversity in Opinions."[7]

The political philosopher Thomas Hobbes elaborated on this idea. He said that "men's actions are derived from the opinions they have . . . ."[8] If government wants to control their actions, it first must control their opinions. It is "necessary for the conservation of peace amongst their subjects" that Christian kings appoint the clergy and control what they teach.[9]

But as even Hobbes sometimes recognized, diverse opinions refused to be abolished. Effective suppression of dissent was elusive, and

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2. *See generally* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2181–208 (2003) (elaborating the reasons for the classic established church that suppressed the free exercise of other faiths).

3. Pope Pius IX, *Quanta Cura* (1864), *reprinted in* 1 THE PAPAL ENCYCLICALS 1740–1878, at 381, 382 (Claudia Carlen Ihm ed., 1981).

4. Saint Augustine, *Letter 105*, *in* AUGUSTINE: POLITICAL WRITINGS 162, 166 (E.M. Atkins & R.J. Dodaro eds., 2001) ("Whoever despises these [true teachings] calls judgement upon himself. For he not only pays the penalty on the human level, but will also have no way to face God.").

5. The Six Articles Act, 1539, 31 Henry VIII, ch. 14 (Eng.), *reprinted in* DOCUMENTS ILLUSTRATIVE OF ENGLISH CHURCH HISTORY 303, 303 (Henry Gee & William John Hardy eds., 1896).

6. *Id.*

7. The Act became known as the Six Articles Act because it prescribed six theological propositions to be accepted as true, but its original title was "An Act abolishing diversity in Opinions." *Id.*

8. THOMAS HOBBES, LEVIATHAN 360 (J. C. A. Gaskin ed., 1998) (1651).

9. *Id.* at 361.

consequently, peace through suppression was also elusive. James Madison wrote that "[t]orrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord . . . ."[10] But time had "revealed the true remedy."[11] Every easing of restrictions had reduced the level of conflict. Completely give up on uniformity, and religious peace would come.

The argument about how to keep the peace was essentially secular. The answer to the saving-souls argument was necessarily more theological. Precisely because each individual's salvation was at stake, each individual must decide for himself. This turned the older view on its head: religion is too important to be left to government. Government is not a competent judge of religious truth; no man increases his chance of salvation by believing whatever the current administration tells him to believe.[12] More fundamentally, even if the government is right about the true faith, coercion cannot save souls. In John Locke's formulation, "true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God."[13] This was a point much emphasized by Protestant advocates of religious liberty in America.[14]

Catholics came to this understanding of faith rather later, but they did come to it. *Dignitatis Humanae* proclaims religious liberty as an inherent attribute of human dignity. And it puts Locke's argument in Catholic terms: "For, of its very nature, the exercise of religion consists before all else in those internal, voluntary, and free acts whereby man sets the course of his life directly toward God. No merely human power can either command or prohibit acts of this kind."[15]

The American supporters of religious liberty had additional arguments, many of them religious. Duties to God are superior to any

10. James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 11 (1785), *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, 63, 69 (1947).

11. *Id.*

12. *See* JOHN LOCKE, *A Letter Concerning Toleration*, *in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 215, 220 (Ian Shapiro ed., 2003) (1690).

13. *Id.* at 219.

14. *See, e.g.*, Isaac Backus, *Draft for a Bill of Rights for the Massachusetts Constitution* (1779), *in* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754–1789, at 493, 493 (William G. McLoughlin ed., 1968) ("[N]othing can be true religion but a voluntary obedience unto [God's] revealed will . . . ."); Elisha Williams, *The Essential Rights and Liberties of Protestants* (1744), *in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 51, 62 (Ellis Sandoz ed., 2d ed. 1991) ("No action is a religious action without understanding and choice in the agent . . . ."). *See generally* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1420–540 (2004) (reviewing the work of Backus, Williams, and other advocates of religious liberty).

15. Pope Paul VI, *Dignitatis Humanae*, *in* THE DOCUMENTS OF VATICAN II 675, 681 (Walter M. Abbott, ed., 1966).

temporal obligation,[16] and of course, each individual must be the judge of what those duties are. Government support for religion tends to corrupt the faith, turning it to political ends.[17] Government financial support produces indolence in the clergy and lack of commitment in the laity.[18]

In the colonies that most resisted religious liberty, religious views moderated over time. The descendants of the original Puritans did not share the first generation's religious intensity, or its homogeneity. By the early eighteenth century, toleration came even to New England.

In 1708, Connecticut authorized free worship by any denomination of Christians.[19] And by the 1720s, New England was enacting regulatory exemptions for religious minorities. In 1728, Massachusetts exempted Quakers and Anabaptists from paying the church tax;[20] in 1744, it exempted Quakers from swearing oaths;[21] and in 1757, it addressed the most difficult issue of all and exempted Quakers from serving in the militia.[22] Religious exemptions from regulation naturally followed the new commitment to toleration because toleration was illusory without them. It did little good to refrain from prosecuting Quakers for identifying as Quakers, only to prosecute them instead for performing the religious obligations of Quakers.[23]

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16. Madison, *supra* note 10, at ¶ 1.

17. *See generally* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1848–93 (2009) (reviewing this and other ways in which government support was thought to corrupt religion).

18. *See* Madison, *supra* note 10, at ¶¶ 6–8.

19. An Act for Securing the Rights of Conscience in Matters of Religion, to Christians of Every Denomination in this State, *reprinted in* ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 21, 21–22 (Hartford, Elisha Babcock 1786). This source is a collection of Connecticut statutes in effect in 1786; it does not give dates of enactment. The Baptist leader John Leland gives the date of the original version of this statute as 1708. John Leland, *Extracts from Connecticut Ecclesiastical Laws*, *in* THE CONNECTICUT DISSENTERS' STRONG BOX: NO. 1, at 26, 28 (New London, Charles Holt 1802).

20. An Act to Exempt Persons Commonly Called Anabaptists, and Those Called Quakers, Within this Province, from Being Taxed for and Towards the Support of Ministers (1728), *reprinted in* 2 ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 494–96 (Boston, Wright & Potter 1874) [hereinafter MASSACHUSETTS ACTS AND RESOLVES].

21. An Act Providing that the Solemn Affirmation of the People Called Quakers Shall, in Certain Cases, be Accepted Instead of an Oath in the Usual Form; and for Preventing Inconveniences by Means of Their Having Heretofore Acted in some Town Offices Without Taking the Oaths by Law Required for such Offices (1744), *reprinted in* 3 MASSACHUSETTS ACTS AND RESOLVES, *supra* note 20, at 126 (Boston, Wright & Potter 1878).

22. An Act to Exempt the People Called Quakers from the Penalty of the Law for Non-Attendance on Military Musters (1757), *reprinted in* 4 MASSACHUSETTS ACTS AND RESOLVES, *supra* note 20, at 49 (Rand, Avery & Co. 1881).

23. *See generally* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1803–08 (2006) (reviewing the exemptions mentioned in this paragraph and others from the colonial and early national periods); Michael W. McConnell, *The Origins and Historical*

Establishing free exercise of religion in principle did not mean that it was always enforced in practice, or that there were no disagreements about its boundaries. Unlicensed Baptist preachers in the eighteenth century,[24] Catholics[25] and Mormons[26] in the nineteenth, Jehovah's Witnesses[27] and the high-demand religions demonized as cults[28] in the twentieth, and Muslims in the twenty-first,[29] have all been subjected to harassment or suppression, both private and governmental, sometimes rising to the level of persecution.

These and other failures to live up to our ideals have been substantial, and probably inevitable. Even so, religious liberty in America has been a remarkable success story. The oppressed groups I just mentioned, and a remarkable variety of other faiths, all worship in peace nearly every week and in every place where they live in America. You may regret that so many Americans have fallen into so much religious error. But given that such religious diversity exists in the world, it is a remarkable good that all these diverse faiths live together in peace, and more or less in equality, in the same society.

II. THE MODERN RESISTANCE TO FREE EXERCISE

So why do I worry that this success story is now at risk? *Sex and Atheism* is obviously short hand, but it flags the core of the problem. Disagreements about sexual morality, and disagreements about the truth and significance of any and all religions, are reopening the debate over first principles.

Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1466–73 (1990) (same).

24. THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 13–15 (1977).

25. *See, e.g.*, DAVID H. BENNETT, THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY *passim* (1988) (with a detailed index entry for "anti-Catholicism"); JAMES HENNESEY, AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES 118–27 (1981); 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 784–853 (1950).

26. *See, e.g.*, LEONARD J. ARRINGTON & DAVIS BITTON, THE MORMON EXPERIENCE 44–105, 161–205 (2d ed. 1992); 2 STOKES, *supra* note 25, at 42–47.

27. *See, e.g.*, SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION (2000).

28. *See, e.g.*, ANSON D. SHUPE & DAVID G. BROMLEY, THE NEW VIGILANTES: DEPROGRAMMERS, ANTI-CULTISTS, AND THE NEW RELIGIONS (1980) (reviewing the anti-cult movement, kidnappings, and deprogramming); Douglas Laycock, *Amicus Brief in* Int'l Soc'y of Krishna Consciousness v. George (1991), *in* RELIGIOUS LIBERTY, VOLUME TWO: THE FREE EXERCISE CLAUSE 741, 741–51 (2011) (reviewing kidnapping, deprogramming, and tort suits, and collecting sources).

29. *See, e.g.*, Laurie Goodstein, *Around Country, Mosque Projects Meet Opposition*, N.Y. TIMES, Aug. 8, 2010, at A1, *available at* 2010 WLNR 15766331.

A. Sex

In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA") by a 97–3 vote in the Senate[30] and by a unanimous voice vote in the House.[31] In 1997, when the Supreme Court held that RFRA exceeded the scope of Congressional power, Congress was outraged. Bipartisan sponsors promptly proposed the Religious Liberty Protection Act ("RLPA").[32] RLPA was a narrower bill, a lesser included case of RFRA. If RFRA had overwhelming support, then RLPA should also have had overwhelming support. Yet despite strenuous efforts through 1998 and 1999, RLPA failed to pass. What had happened between 1993 and 1998?

The most important thing that happened was a series of lawsuits against small landlords who refused to rent apartments to unmarried opposite-sex couples. The couples alleged marital-status discrimination; the landlords defended on the basis of religious liberty. In the two highest profile cases, a California landlord lost in the state supreme court;[33] an Alaska landlord won, at least temporarily, in the Ninth Circuit.[34] Everyone understood that if religious landlords had a defense to marital-status discrimination, they would also have a defense to sexual-orientation discrimination.

This litigation galvanized the gay rights movement.[35] Gay groups organized the entire civil rights movement to oppose RLPA as drafted. They wanted a global exception for any civil rights claim.[36] The bill's

30. *See* 139 CONG. REC. 26,416 (cumulative ed. Oct. 27, 1993).

31. *See* Linda Feldmann, *Congress to Boost Freedom of Religion*, CHRIST. SCI. MON., May 17, 1993, at 1, *available at* 1993 WLNR 1022958.

32. S.2148, 105th Cong. (1998); H.R. 4019, 105th Cong. (1998); S.2081, 106th Cong. (2000); H.R. 1691, 106th Cong. (1999).

33. Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909 (Cal. 1996).

34. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc). The lead sponsor in the House attributed the opposition to RLPA principally to this case. "What triggered this objection? I think what all of this is about, if we get right down to the facts of what is motivating this, was a 9th Circuit case in which a small religious landlord challenging a housing law was granted an exemption from compliance." 145 CONG. REC. H5599 (daily ed. July 15, 1999) (statement of Mr. Canady). The bill had other opponents, but it was the civil rights groups that generated the most debate and that appeared to generate the partisan deadlock that ensued.

35. This paragraph is based on extensive personal experience as well as the sources cited. There were nine hearings on the various RLPA bills over a three-year period. I testified at six of them, and I was involved in many off-the-record discussions and negotiations with supporters and opponents of the bill and with Congressional staff, the Department of Justice, and the White House Counsel's office.

36. *See Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 81–90 (1999) (Statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union); *id.* at 96–100 (Statement of Chai R. Feldblum, Professor of Law and Director, Federal Legislation Clinic, Georgetown University Law Center).

supporters would not agree. They cited examples that should have been uncontroversial—ordination rules, which sometimes involve sex discrimination; rules for membership in religious organizations, which generally involve religious discrimination; and laws in some states that prohibit employment discrimination on the basis of "any lawful off-the-job activity."[37] Think about the church secretary moonlighting in a strip club, or in an abortion clinic. Think about any other behavior that is legal but widely viewed as immoral. These arguments went nowhere. Republicans mostly lined up behind the conservative Christians, Democrats mostly lined up behind the civil rights movement, and the bill died in party-line acrimony.[38]

So far, this is just a typical story of an interest group pursuing its regulatory agenda and opposing all exceptions. Interest groups with a regulatory agenda tend to be single-issue types, reluctant to compromise with competing interests. And they see religious liberty as just one more competing interest. But they are not necessarily opposed to religion, or to religious liberty, where their particular interest is not at stake.

Maybe the recurring battles between gay rights and religious liberty are no different. The gay rights movement has not opposed religious liberty bills with no apparent impact on gay rights. It did not oppose the Religious Land Use and Institutionalized Persons Act,[39] or the Religious Liberty and Charitable Donation Protection Act.[40] Gay rights and pro-choice advocates have successfully opposed the proposed Workplace Religious Freedom Act, but they do not oppose a "narrowly tailored"

37. *See Religious Liberty, Hearing Before the Senate Committee on the Judiciary*, 106th Cong. 99–101 (1999) (Statement of Douglas Laycock).

38. The committee hearings that I attended were totally polarized on party lines. On the floor, the polarization was less total. The amendment offered on the floor, by Mr. Nadler, would not have been a global exception, but it would have been a sweeping exception for civil rights claims. *See* 145 CONG. REC. H5597 (daily ed. July 15, 1999) (§ 4(e) of Mr. Nadler's amendment in the nature of a substitute). That amendment was defeated 190–234. *Id.* at H5607. Thirty Democrats, mostly from the south, voted Nay; fifteen Republicans, mostly from the northeast, voted Aye. *Compare* the roll call vote, *id.* at H5608, *with* Jeff Trandahl, Clerk of the House of Representatives, *Official Alphabetical List of the House of Representatives of the United States One Hundred Sixth Congress 1999–2001*, OFFICE OF THE CLERK, http://artandhistory.house.gov/house_history/oalmbr.aspx?congress=106h (listing members with their party affiliations) (last visited Sept. 3, 2011). The unamended bill then passed the House 306–118, 145 CONG. REC. H5608, which means that many who voted for the Nadler amendment refused the civil rights movement's demand to vote against the bill if not amended. In the Senate, the bill was referred to the Committee on the Judiciary, where it died. *See Bill Summary & Status: 106th Cong. (1999–2000)*, LIBRARY OF CONGRESS, http://www.thomas.gov/cgi-bin/bdquery/z?d106:HR01691:@@@S (last visited Sept. 3, 2011) (all congressional actions with amendments).

39. 42 U.S.C. §§ 2000cc to 2000cc-4 (2006).

40. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183 (codified as amended at 11 U.S.C. §§ 544, 546, 548, 1325 (2006)).

version that would cover only religious dress and religious holidays.[41] Gay rights groups collaborate with theologically liberal churches that support their rights.[42] Large numbers of gays and lesbians report personal religious faith, although at somewhat lower rates than heterosexuals.[43]

Even so, my sense is that the deep disagreements over sexual morality are different from disagreements with other interest groups that resist exceptions for religious liberty. These disagreements have generated a much more pervasive hostility to certain kinds of religion, and this hostility has consequences.

A recent socio-political history argues that the gay rights movement is in a symbiotic adversarial relationship with the religious right.[44] Its tactics, and even its strategic priorities, have been shaped by the religious right. The religious right did far more to put gay rights and same-sex marriage on the national agenda than anything gays and lesbians could have accomplished on their own. There is a substantial body of litigation, in a wide range of factual settings, over conflicting claims to religious liberty and gay rights.[45]

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41. *See ACLU Urges House Committee to Fix Flawed Workplace Religious Freedom Act*, AM. CIVIL LIBERTIES UNION (Feb. 12, 2008), http://www.aclu.org/religion-belief/aclu-urges-house-committee-fix-flawed-workplace-religious-freedom-act; Letter from American Civil Liberties Union *et al.*, to Members of the House of Representatives (May 15, 2008), *available at* http://www.aclu.org/files/images/asset_upload_file767_35359.pdf; *Protecting American Employees from Workplace Discrimination: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the Comm. on Education and Labor*, 110th Cong. 72–76 (2008) (Statement of Richard Foltin, Legislative Director and Counsel, American Jewish Committee) (responding to these arguments). No gay rights or pro-choice witness testified at this hearing. The opponents of this legislation have kept it bottled up since the first hearing was held in 1997. *See Workplace Religious Freedom Act: Hearing of the Senate Comm. on Labor and Human Resources on S. 1124 to Amend Title VII of the Civil Rights Act of 1964 to Establish Provisions with Respect to Religious Accommodation in Employment, and for Other Purposes*, 105th Cong. (1997). But they appear to have done most of their work off the record.

42. For example, the Institute for Welcoming Resources is an organization of churches that "welcom[e] and affirm[] all congregants regardless of sexual orientation and gender identity." It is part of the National Gay and Lesbian Task Force. *See About IWR*, INSTITUTE FOR WELCOMING RESOURCES, http://www.welcomingresources.org/about.htm (last visited Sept. 3, 2011).

43. *See Spiritual Profile of Homosexual Adults Provides Surprising Insights*, THE BARNA GROUP, http://www.barna.org/barna-update/article/13-culture/282-spiritual-profile-of-homosexual-adults-provides-surprising-insights (last visited Sept. 3, 2011). George Barna of the Barna Group is an evangelical pollster; this survey was completed in late 2008 and early 2009, and the sample included 280 respondents who identified as gay or lesbian. *Id.*

44. TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM (2008).

45. *See* Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1 (Douglas Laycock, Anthony R. Picarello, & Robin Fretwell Wilson eds., 2008) (collecting these cases).

The result of this history is that groups committed to sexual liberty naturally view traditional religion as their principal enemy. A more journalistic version of the history I just summarized has the suggestive title, *Perfect Enemies*.[46] 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. Here I draw partly from the published record and partly from personal experience in debates over proposed legislation.

The gay rights movement sees traditional religious teachings about same-sex relationships as simple bigotry. And it sees religion as the principal force that legitimates bigotry—and by legitimating it—helps sustain it. In this view, religion dresses hate and bigotry in quasi-respectable disguise. And in terms of support for laws that restrict how gays can live their lives, there is no difference between raw unthinking bigotry and the most sophisticated theological discourse. Recall Hobbes again: "[M]en's actions are derived from the opinions they have . . . ."[47] To eliminate the acts, one must eliminate the opinions, or, what might be actually achievable, render the opinions illegitimate and drive them underground.

A small but illustrative group is New Yorkers Against Religion-Based Bigotry. Their slogan is: "Whatever the religious right wing is against, we are for!"[48] A few minutes Googling reveals that individuals are even more blunt. The gay Shakespearean actor Ian McKellen said in an interview: "I increasingly see organized religion as actually my enemy. They treat me as their enemy."[49] A lesbian leader says that her community sees the Mormons "as a force for evil."[50] The first comment on the online version of that story says that: "Religion is the enemy of civil rights, and that's why the two are incompatible . . ."[51]

David Benkof is a gay columnist who opposes same-sex marriage and thinks the movement should focus on more pressing issues. Many gay leaders refused to answer some of his questions about gay rights and religion. But as he paraphrases the two who did answer, "people who

46. JOHN GALLAGHER & CHRIS BULL, PERFECT ENEMIES: THE BATTLE BETWEEN THE RELIGIOUS RIGHT AND THE GAY MOVEMENT (updated ed. 2001).

47. HOBBES, *supra* note 8, at 360.

48. NEW YORKERS AGAINST RELIGION-BASED BIGOTRY, http://nyarbb.com/ (last visited Sept. 3, 2011).

49. Matea Gold, *McKellen's Crisp Clarity in Autumn*, L.A. TIMES, Nov. 14, 2009, at 1, *available at* 2009 WLNR 22893548.

50. *Mormon Image Suffers After Gay Marriage Fight*, WASH. TIMES (Aug. 16, 2009), http://www.washingtontimes.com/news/2009/aug/16/mormon-image-suffers-after-gay-marriage-fight/.

51. *Id.*

continue to act as if marriage is a union between a man and a woman should face being fined, fired and even jailed until they relent."[52]

Another gay columnist lists "10 religious enemies of LGBT rights."[53] It is not clear whether the ten are listed in any particular order. But second on the list is Fred Phelps, the man who pickets funerals with signs that say "God Hates Fags." And next on the list is Pope Benedict XVI. The gay community does not distinguish religious discourse based on its quality or its seriousness; what mostly matters is the conclusion. Are you for them or against them? Other well known names on this list are James Dobson, Pat Robertson, the Southern Baptist Convention, and the Church of Jesus Christ of Latter-Day Saints.

Chai Feldblum offers a view that is more sophisticated and more general. She has had a distinguished career as a law professor, an advocate for gay rights, and now a Commissioner of the Equal Employment Opportunity Commission. She is the lesbian daughter of an Orthodox rabbi; she understands both sides. She recognizes that compliance with gay rights legislation, or with same-sex marriage legislation, often burdens the religious exercise of conservative believers. She says we have to recognize that burden, and we have to justify it every time we impose it.[54] But having said that, she concludes that the burden is nearly always justified. She has trouble thinking of cases where she would permit an exception to gay rights laws in the interest of religious liberty.[55]

Conservative religious organizations denounce Feldblum as a radical.[56] But in gay and lesbian organizations, her view that the burden on religion must be recognized and justified puts her out on the right wing.

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52. David Benkof, *Why California Gays Shouldn't Celebrate State Court Ruling*, SEATTLE POST-INTELLIGENCER, May 20, 2008, at B7, *available at* 2008 WLNR 9669866.

53. Dyana Bagby, *Faith & Religion: 10 Religious Enemies of LGBT Rights*, GEORGIA VOICE (Feb. 18, 2011), http://www.thegavoice.com/index.php/community/features-menu/2086-faith-a-religion-10-religious-enemies-of-lgbt-rights.

54. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 103–04, 120 (2006); Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WKLY. STANDARD (May 15, 2006), http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp.

55. Feldblum, *supra* note 54, at 115–22; Gallagher, *supra* note 54. Feldblum does propose one very narrow exception for religious liberty and suggests one more possibility for further debate. Feldblum, *supra* note 54, at 121–22.

56. *See, e.g.*, Thomas Peters, *For Feldblum, Obama Goes the Recess Route*, AM. PRINCIPLES PROJECT NEWS (Mar. 29, 2010) (on file with the University of Detroit Mercy Law Review); *Lesbian EEOC Nominee Chai Feldblum is Running from Her Radical Record*, AMERICANS FOR TRUTH ABOUT HOMOSEXUALITY, http://americansfortruth.com/2009/12/10/lesbian-eeoc-nominee-chai-feldblum-is-running-from-her-radical-record/ (last visited Sept. 26, 2011); *Yet Another Radical Obama Nominee*, TRADITIONAL VALUES COALITION, http://www.traditionalvalues.org/content/action_alerts/30682/Yet%20Another%20Radical%20Obama%20Nominee (last visited Sept. 3, 2011).

She says that the vast majority of her colleagues in the gay rights movement deny that gay rights laws impose any burden on the free exercise of religion.[57] Traditional believers can just abandon any occupation that would require them to violate their conscience.

There is a similar conflict with respect to abortion. Abortion remains a constitutional right,[58] but religious liberty rights are protected by federal statute and by state law in most states.[59] Effective enforcement mechanisms are not in place for some violations,[60] but the law is that neither individuals nor institutions have to perform or assist an abortion or sterilization in violation of their conscience.

These conscience rights are controversial in the pro-choice community. People on the pro-choice side want choice for pregnant women, but they do not want choice for medical providers. Their solution to the problem of conscience is that there should be no pro-life obstetricians or gynecologists, no pro-life nurses on the obstetrics ward, no medical provider anywhere who might have to step aside and let someone else treat a patient who wants an abortion. "[P]hysicians and other health care providers have an obligation to choose specialties that are not moral minefields for them. Qualms about abortion, sterilization, and birth control? Do not practice women's health."[61]

This is another bitter battle between deeply held moral commitments that are utterly inconsistent. It is spreading beyond abortion to other medical services related to reproduction, including the dispute over pharmacists and emergency contraception. The George W. Bush Administration issued rules broadly interpreting the existing federal conscience protections;[62] the Obama Administration recently withdrew

57. Gallagher, *supra* note 54. I have also heard Feldblum say this, probably when she presented her paper at a Becket Fund Conference in 2005.

58. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992).

59. The principal federal provisions are codified at 42 U.S.C. § 288n (2006) and 42 U.S.C. § 300a-7 (2006). Other provisions are re-enacted annually as appropriations riders. Additional protections were added in the Patient Protection and Affordable Care Act (the healthcare reform act). Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1303(a)(3), 1303(b)(2), 2010 U.S.C.C.A.N. (124 Stat. 168) 868 (codified at 42 U.S.C. §§ 18023(b)(4), 18023(c)(2)). *See generally* Dep't of Health and Human Servs., Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9968–70 (Feb. 23, 2011) (reviewing federal protections); Robin Fretwell Wilson, *Essay: The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 47–52 (2008) (surveying both state and federal protections).

60. *See* Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 696 (2d Cir. 2010) (holding that an employee has no private right of action against an employer that violates her federal right not to assist with an abortion).

61. Julie D. Cantor, *Conscientious Objection Gone Awry—Restoring Selfless Professionalism in Medicine*, 360 NEW ENG. J. MED. 1484, 1485 (2009).

62. Dep't of Health & Human Servs., Ensuring that Department of Health and Human Services Funds do not Support Coercive or Discriminatory Policies or Practices in Violation

most of those rules while expressing support for the underlying statutory protections.[63] The enormous flap over the Bush rules and their repeal—the Obama Administration received more than 300,000 comments on the proposed repeal[64]—seems to reflect the deep mistrust between the two sides more than any number of actual incidents potentially affected by the presence or absence of the Bush rules.

The level of hostility is one way in which these fights are unlike most religious liberty conflicts today. Another is the reciprocal nature of the conflict: each side wants to regulate much that the other side considers private, personal, and essential to identity. The pro-life and traditional marriage side wants to eliminate abortions and restrict the personal lives of gays and lesbians. The pro-choice and gay rights groups want conservative believers not just to leave them alone, but to affirmatively assist with abortions and same-sex relationships—or else leave any occupation that might ever be relevant. In this respect, these battles are like the religious battles of the sixteenth century; each side wants to eliminate or repress the other. Fortunately, except for a handful of crazies, these battles are wholly unlike the seventeenth century in terms of the level of violence.

Neither side is going to change its mind about abortion. You cannot compromise with what you think is murder, and you cannot compromise with what you think is the physical invasion and commandeering of your body and your life.

The gay rights issues are different; they will be resolved. There will come a time when religious hostility to gays and to same-sex relationships will be as disreputable as religious hostility to blacks and to interracial relationships. The Catholic Church may or may not change its official teaching, but if it does not, American Catholics will pay no more attention

of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008) (codified at 45 C.F.R. pts. 88.1–88.6) (repealed in part, effective Mar. 25, 2011).

63. Dep't of Health & Human Servs., Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. at 9968–70.

64. *Id.* at 9971.

than they pay to *Humanae Vitae*.[65] The trend in the polling data is clear,[66] and the age structure in that data is equally clear.[67]

But it makes all the difference in the world how we get there. It is one thing if religious believers change their minds about a moral issue, or if those who cannot change their minds eventually die of natural causes and a new generation holds a different view. It is a very different thing if those who cannot change their mind are sued, fined, forced to violate their conscience, and excluded from occupations if they refuse. The first path is consistent with liberty for all. The second path causes the very kinds of human suffering that religious liberty is designed to avoid.

B. Atheism

Self-professed atheists are the tip of a vastly larger secular population of nonbelievers and nominal believers. In the American Religious Identification Survey, with a sample size of more than 54,000, we can get representative data even on very small religious groups.[68] Only 1.6% of Americans reported their religion as atheist or agnostic in 2008, but 15% reported having no religion, and another 5.2%, demographically similar to the no-religion people, said either that they *do not know* their religion or that they refused to answer the question.[69] A Pew Forum survey, with a sample size of more than 35,000, got answers in the same range but with some noticeable differences: 4% self identified as atheist or agnostic,

65. Pope Paul VI, *Humanae Vitae*, *reprinted in* 5 THE PAPAL ENCYCLICALS 1958–1981, at 223 (Claudia Carlen Ihm ed., 1981) (forbidding use of artificial birth control).

66. In a series of Washington Post/ABC polls, using identical wording for the question, support for same-sex marriage has moved from 37% in 2003 to 53% in 2011. Sandhya Somashekhar & Peyton Craighill, *Slim Majority Back Gay Marriage, Post-ABC Poll Says*, WASH. POST, Mar. 18, 2011, at A2, *available at* 2011 WLNR 5420460. Support was at 25% in the mid 1990s. Andrew Gelman, Jeffrey Lax, & Justin Phillips, *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 21, 2010, at 3, *available at* 2010 WLNR 16719186. A series of Pew Research polls shows the same trend but, with a somewhat differently worded question, less dramatic results—45% in favor and 46% opposed in the most recent poll. *Fewer are Angry at Government, but Discontent Remains High*, PEW RESEARCH CENTER (Mar. 3, 2011), http://people-press.org/report/?pageid=1920.

67. Support for same-sex marriage is strongly and inversely correlated with age; support is 25 to 40 points higher among survey respondents aged 18 to 29 than among respondents 65 and over. State-by-state estimates by age appear in an online-only appendix to Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, Fig. 8 (2009), *available at* http://www.columbia.edu/~jhp2121/publications/GayRightsInTheStates.pdf.

68. Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey*, TRINITY COLLEGE (2009), http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf.

69. *Id.* at 5 tbl.3.

16.1% reported no religion, and only 0.8% did not know or refused to answer.[70]

These answers cannot be taken entirely at face value, but the likely exaggerations run in both directions. One study suggests that much of the growth in people reporting no religion is people disgusted with the religious right and trying to disassociate themselves from it.[71] Some of the no-religion people report rather conventional religious beliefs. In the Pew Forum survey, 5.8% of respondents reported no religion and also said that religion is somewhat or very important in their lives.[72] More remarkably, 21% of self-identified atheists said they believe in God or a universal spirit,[73] and 10% of atheists said they pray at least weekly.[74] You cannot assume that survey respondents all understand the questions the same way you do.

These answers suggest believers with no religious identity. But other Americans report a religious identity without having much in the way of belief. When the American Religious Identification Survey asked about the existence of God, 12.3% said "There is no such thing," "There is no way to know," or "I'm not sure."[75] These are the atheist and agnostic answers, and they appeared nearly eight times as often as people who labeled themselves atheist or agnostic. Another 6.1% refused to answer.[76] It seems unlikely that belief in God is an important part of the lives of those who refuse to answer the question. Another 12.1% said "There is a higher power but no personal God."[77] That leaves 69.5% who said "There is definitely a personal God."[78] A 30% minority is nearly a hundred million Americans with no strong belief in a personal God.

And of course, not everyone who tells a pollster he believes in God is seriously religious. The religiously indifferent who rarely think about it much may report belief in God when asked. They may also mostly ignore that belief and live their daily lives on a thoroughly secular world view. It is hard to get at these gradations of belief with a survey instrument. But the Pew Forum survey reports that only 56% of Americans say that religion is

70. *U.S. Religious Landscape Survey*, PEW FORUM ON RELIGION & PUBLIC LIFE 5 (2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf. In each survey, the self-identified atheists and agnostics are included in the larger number for no religion.

71. *See* Michael Hout & Claude S. Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 AM. SOC. REV. 165, 178–89 (2002).

72. *U.S. Religious Landscape Survey*, *supra* note 70, at 6.

73. *U.S. Religious Landscapes Survey: Summary of Key Findings*, PEW FORUM ON RELIGION & PUBLIC LIFE 5, 9 (2008), *available at* http://religions.pewforum.org/pdf/report2religious-landscape-study-key-findings.pdf.

74. *Id.* at 13.

75. Kosmin & Keysar, *supra* note 68, at 8 tbl.4.

76. *Id.*

77. *Id.*

78. *Id.*

"very important" in their lives,[79] and only 29% say they rely mainly on their religious beliefs for guidance regarding right and wrong.[80] And 34% say that "[r]eligion causes more problems in society than it solves."[81]

Religious *behaviors* are also consistent with a large secular minority. Thirty percent of married Americans were not married in a religious ceremony, and 27% of Americans do not expect to have a religious funeral when they die.[82] And that is before we get to the people who show up at church only to be married and buried.

I am not suggesting that the United States is finally on the path to secularization. We are still a highly religious nation. Fifty-six percent, or 69.5%, would be a landslide majority in any election. My point is only that the secular minority is also large. It can no longer be dismissed as too small to matter.

There are atheist activists like Michael Newdow, who keeps suing over "under God" in the Pledge of Allegiance,[83] and the Freedom From Religion Foundation, which has even sued over Presidential speeches.[84] But most nonbelievers are quietly in the closet, seeing no need to provoke arguments with their neighbors and co-workers, and perhaps fearing ostracism if they do. Sixty-four percent of those reporting no religion say they "seldom" or "never" share those views with religious people.[85] Atheists appear to be the least tolerated minority group in American society. Would you vote for a well-qualified atheist that your party nominated for President? Would you be unhappy if your child married an atheist? Do atheists agree with your vision of American society? Not at all? On measures such as these, atheists do much worse than any other group—worse than Muslims, worse than gays and lesbians, worse than conservative Christians, and much worse than any racial or ethnic minority.[86]

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79. *U.S. Religious Landscape Survey*, *supra* note 70, at 155.

80. *Id.* at 142.

81. *Id.* at 173.

82. Kosmin & Keysar, *supra* note 68, at 10 tbl.6.

83. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007 (9th Cir. 2010). Newdow also sued to enjoin prayers at presidential inaugurations and the addition of "so help me God" to the presidential oath, *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2144 (2010), "In God We Trust" on coins and currency, *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1612 (2011), and Congressional chaplains and Congressional prayers, *Newdow v. Eagen*, 309 F. Supp. 2d 29 (D.D.C. 2004), *appeal dismissed*, No. 04-5195, 2004 WL 1701043 (D.C. Cir. 2004).

84. *See* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007).

85. *U.S. Religious Landscape Survey*, *supra* note 70, at 184.

86. Penny Edgell, Joseph Gerteis, & Douglas Hartmann, *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*, 71 AM. SOC. REV. 211, 212, 215–19 (2006).

Atheists are hard to survey, but it is clear that some of them return the disapproval. One group of nonbelievers calls itself "Brights,"[87] which seems to imply that believers are "Dulls," or maybe "Not-So-Brights." And outspoken nonbelievers ridicule religious belief in miracles, the resurrection, life after death, creationism, and any other supernatural claim.[88]

A large secular minority gradually coming to public awareness changes the structure of the debate over religious liberty. The original commitment to religious liberty was a sort of mutual non-aggression pact. Everyone had a religion, and everyone would be protected by religious liberty. Small religions were more at risk than large religions, but numbers could change, and especially in America, people could move. A right to free exercise of religion was a promise to everyone—you will not be persecuted for your religious beliefs or practices.

It is still the case that everyone has a belief *about* religion, and that everyone should be protected by religious liberty. But many Americans do not see it that way. Much of the nonbelieving minority sees religious liberty as a protection only for believers.[89] On that view, a universal natural right morphs into a special interest demand—and on behalf of an interest group that, to many of its opponents, seems especially undeserving. One view of the debates over gay rights and abortion is that many of the believers claiming liberty for themselves seem intent on restricting the liberty of others.

Many believers share the view that nonbelievers are not protected by guarantees of religious liberty, or at least not by important elements of those guarantees.[90] By claiming religious liberty as a right only for themselves, they help confirm the nonbelievers' view of religious liberty as just another special interest demand.

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87. THE BRIGHTS, http://www.the-brights.net (last visited Sept. 3, 2011). Not surprisingly, this usage is controversial even among nonbelievers. *See* Rebecca Phillips, *A Bright Unto the World?*, http://www.beliefnet.com/Faiths/Secular-Philosophies/A-Bright-Unto-The-World.aspx (last visited Sept. 3, 2011).

88. Such comments can be found even in academic volumes. *See, e.g.*, Simon Blackburn, *Religion and Respect*, *in* PHILOSOPHERS WITHOUT GODS: MEDITATIONS ON ATHEISM AND THE SECULAR LIFE 179, 179 (Louise M. Antony ed., 2007) (comparing the beliefs underlying a Jewish Sabbath observance to "the beliefs of flat-Earthers or those of the people who believed that the Hale-Bopp comet was a recycling facility for dead Californians and killed themselves in order to join it").

89. *See, e.g.*, Laycock, *supra* note 23, at 1796 n.12 (collecting briefs and articles arguing variations on the theme that regulatory exemptions for religious exercise establish religion by giving it special treatment).

90. *See, e.g.*, John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 288 (1996) (describing what he calls "the split-level character of free exercise law"); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 10 (1985) (arguing that moral obligations of nonbelievers cannot be constitutionally protected because they are not derived from their non-belief).

This changing view of religious liberty is both a practical problem and a theoretical problem. At the practical level, it creates political opponents, and it causes judges to worry about discriminating against nonbelievers. At the more theoretical level, scholars from all points on the spectrum now question whether there is any modern justification for religious liberty.[91] Religious *ideas* might be protected like any other idea, principally by the Free Speech Clause. Religious *discrimination* might be prohibited by the Equal Protection Clause. And these protections are important. But, the argument goes, there is nothing distinctive about religion that would justify protecting *religious* liberty as such. And on that view, there is no justification for a Free Exercise of Religion Clause.

We see this argument from the firmly secular firmly left in Brian Leiter's *Why Tolerate Religion?*[92] His answer is that we should tolerate deeply held claims of conscience, and that religion should not be singled out for adverse treatment, but that there is nothing distinctive about religion that would justify tolerating religion as such.

We see a variation on this theme from the seriously religious moderate left in the work of Fred Gedicks, who has argued that regulatory exemptions for religious practice have become indefensible—regrettably so in his view, but indefensible nonetheless.[93] He thinks that advocates of religious liberty should focus their efforts on other issues where modest victories might still be won.[94]

We see another form of the idea in the work of a conservative believer, Steven Smith. He writes articles with such pessimistic titles as *The Rise and Fall of Religious Freedom in Constitutional Discourse*,[95] and *Discourse in the Dusk: The Twilight of Religious Freedom?*[96] For Smith, the problem is that legal argument in general, and legal argument about religious liberty in particular, has excluded reliance on religious reasons to

91. *See* Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71 (2001) (arguing that the Free Exercise Clause is redundant as a matter of positive law).

92. Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1 (2008). The article is part of a forthcoming book, also titled WHY TOLERATE RELIGION?.

93. Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555 (1998). In a similar vein, also from a believing perspective (I think), see Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755 (2011); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000).

94. Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925 (2000).

95. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

96. Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869 (2009) (book review).

justify rules of law.[97] Whatever religious communities might say when speaking among themselves, the Supreme Court can no longer justify religious liberty on the ground that every human is responsible for her own salvation, that only voluntary religious faith is efficacious, or that humans owe duties to God that are superior to every temporal obligation. Reasons that were essential to the argument in the eighteenth century became inadmissible in the twentieth, and in Smith's view, the secular arguments that remain are not sufficient to the task.

The Supreme Court's requirement that laws have a secular purpose[98] can be read to rule religious arguments out of bounds, although I think that that requirement is substantially over-read.[99] But even if I am wrong about that, Supreme Court opinions are not the main obstacle. Rather, the disappearance of religious arguments from our public discourse is part and parcel of ever expanding religious diversity. Religious arguments do not speak to the secular minority; religious arguments are more likely to further alienate that minority than to persuade it.

One reading of Smith is that religious liberty in America is a victim of its own success. That is true in more ways than one. It is true in the sense just mentioned: religious liberty has permitted such broad religious pluralism that political leaders cannot effectively speak to the population in religious terms.

It is also true in another sense: religious liberty has led to such a reduction in the level of religious conflict, at least in the United States, that religious conflict no longer seems very fearsome. Fortunately, not many Americans are willing to kill for their faith. It seems likely that not many are willing to die for their faith, or even go to prison for their faith. And so it becomes possible for interest groups and Supreme Court justices to talk about simply enforcing the law without regard to claims of conscience.[100] Fred Gedicks says that even when we were actively persecuting Mormons, Catholics, and Jehovah's Witnesses, we got nothing like the social disruption that tore Europe apart in the sixteenth and seventeenth centuries.[101] The harm of violating conscience now appears only as private pain.

All of this is true. But one reason it is true is that American governments have not very often persisted in trying to stamp out a religious

97. Smith, *supra* note 95, at 180–87.

98. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

99. *See* Douglas Laycock, *Reviews of a Lifetime*, 89 TEX. L. REV. 949, 951–53 (2011); Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 58–59 (2007); Douglas Laycock, *Freedom of Speech that is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 796–807 (1996).

100. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 28–30 (1990) (discussing the Supreme Court's assumption that believers whose religious practices are banned will quietly comply, and doubting the accuracy of that assumption).

101. Gedicks, *supra* note 93, at 563–66.

practice in the face of determined resistance. The Catholics and Jehovah's Witnesses outlasted their tormentors, with important help from the Supreme Court.[102] The Mormons succumbed, changed their teaching on polygamy, and preserved the rest of their faith intact.[103]

A determined effort to uniformly enforce all laws, with no exceptions for religious practice, would lead to serious social conflict. Suppose the government vigorously and persistently insisted that Catholic hospitals and medical workers perform abortions on demand; that Catholic priests testify to what they learn in the confessional, like any other witness with relevant information; that priests perform same-sex weddings in states that recognize same-sex marriages; that bishops ordain women, to comply with the employment discrimination laws; and that Catholic churches refuse communion wine to anyone under twenty-one. Even that would not reproduce sixteenth-century Europe in America. But we would see religious conflict, big-time.

None of the horror stories I just listed is in prospect. Why is that? In the case of abortions and the confessional, because legislators and rule makers have created exemptions in the form of conscience clauses for abortion[104] and the priest-penitent privilege in the law of evidence.[105] In the case of same-sex weddings, because all the legislation and court decisions have acknowledged an exemption for clergy refusing to officiate at weddings.[106] In the case of ordaining women, because the judges have interpreted the Constitution to create a form of exemption for a church's right to choose its own clergy, and that exemption has survived the Supreme Court's general repudiation of free exercise exemptions in other

102. Jehovah's Witnesses won the great majority of a long series of cases in the Supreme Court in the 1930s, 1940s, and 1950s. *See, e.g.*, Fowler v. Rhode Island, 345 U.S. 67 (1953) (invalidating a ban on religious services in public parks); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating a requirement that all children recite the Pledge of Allegiance and salute the flag); Lovell v. Griffin, 303 U.S. 444 (1938) (invalidating standardless licensing of the distribution of literature). For Catholics, see *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (finding a constitutional right to send one's children to private schools).

103. *See* Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992) (reflecting on the Mormon decision to succumb to the government's demand that it abandon polygamy).

104. *See, e.g.*, 42 U.S.C. § 300a-7 (2006).

105. *See* Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 231 n.39 (1998) (collecting the statute or rule from every state).

106. *See* CONN. GEN. STAT. ANN. § 46b–22b (West Supp. 2011); D.C. CODE §§ 46-406(c)–(d) (LexisNexis Supp. 2011); N.H. REV. STAT. ANN. § 457-37.I, II (LexisNexis Supp. 2010); 2011 N.Y. Laws ch. 95, § 5, to be codified at N.Y. DOM. REL. LAW §11.1; 2011 N.Y. Laws ch. 96 § 2, to be codified as N.Y. DOM. REL. LAW § 11.1-a; VT. STAT. ANN. tit. 18, § 5144 (LexisNexis Supp. 2010); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 475 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 905 (Iowa 2009); Goodrich v. Dep't of Pub. Health, 798 N.E.2d 941, 965 n.29 (Mass. 2003).

contexts.[107] And in the case of communion wine, because the liquor authorities have had better sense than to raise the issue.[108]

Only one of these examples has had to explicitly rest on the Constitution. The other examples remind us that much religious liberty is protected not by constitutional doctrine, or at least not *only* by constitutional doctrine, but also by the good sense and forbearance of the political branches. Twenty years ago, my colleague James Ryan counted some 2,000 religious exemptions in the state and federal statute books.[109] Most of those exemptions are constitutionally safe for the foreseeable future. Most of them are probably even politically safe. But they are not free from challenge. Some of them could be repealed in a changing political climate.

Some of the opponents of religious exemptions attack legislatively enacted exemptions as a violation of the Establishment Clause. The Supreme Court has repeatedly and unanimously rejected that argument. But the cases with clear opinions are so divided into pluralities and concurrences,[110] and the unified opinions seem to some readers so tentative and qualified,[111] that the issue refuses to die.

One response to this lecture is to say that I am not talking about the core of free exercise—that I am really just talking about the debate over regulatory exemptions for religious practices. And whether exemptions are constitutionally required is a very old argument.[112] There is some force to that, but I would say several things in response.

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107. *See, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 204–10 (2d Cir. 2008) (collecting cases); Petruska v. Gannon Univ., 462 F.3d 294, 303–04 (3d Cir. 2006) (collecting cases). *See also* Equal Emp't Opportunity Comm'n v. Hosanna-Tabor Evangelical Lutheran Church and Sch., 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (2011). The original question presented in *Hosanna-Tabor* is about the boundaries of this rule. Petition for a Writ of Certiorari, *Hosanna-Tabor*, No 10-553, 2010 WL 4232645. But the merits briefs have put the existence of the rule at issue. *See* Brief for the Federal Respondent, 2011 WL 3319555; Brief for Respondent Cheryl Perich, 2011 WL 3380507; Reply Brief for the Petitioner, 2011 WL 3919718.

108. Some states have been sufficiently careful to enact specific exemptions. GA. CODE ANN. § 3-3-23(b)(2) (West 2003); 235 ILL. COMP. STAT. ANN. § 5/6-20(g) (West Supp. 2011); MONT. CODE ANN. § 16-6-305(1)(a) (2009); N.J. STAT. ANN. § 40:48-1.2.c(1) (West Supp. 2011); N.D. CENT. CODE ANN. § 5-01-08(1) (2009); S.C. CODE ANN. § 61-4-90(C)(3) (2009); TENN. CODE ANN. § 1-3-113(b)(2) (2003). I never warrant that a string citation is complete, but that is especially true in this case.

109. James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 & n.215 (1992).

110. Bd. of Educ. v. Grumet, 512 U.S. 687, 705–06 (1994); Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 334–39 (1987). *See* Laycock, *supra* note 23, at 1840–41 (analyzing these cases with detailed citations to each of the separate opinions).

111. Cutter v. Wilkinson, 544 U.S. 709, 719–26 (2005).

112. *See* McConnell, *supra* note 23, at 1503–11 (collecting early cases going both ways).

First, the idea that there is nothing special about religion that would justify a guarantee of *religious* liberty in particular is in its infancy. If that idea takes hold, there is no predicting its eventual consequences. When the Supreme Court first upheld a conviction for Mormon polygamy in 1878, it emphasized a bright line between belief and conduct.[113] But only twelve years later, in two more Mormon cases, the Court upheld penalties on speech, membership, and even belief.[114]

Second, even if we are talking principally about regulatory exemptions for religious practice, those exemptions are essential to free exercise. Banning an important religious practice can suppress a religious minority as effectively as banning it by name. We can debate whether the Constitution requires such exemptions and makes them judicially enforceable, but that has not been my topic today. The arguments I have discussed are not about the limits of the judicial role and they are not confined to the meaning of the Constitution. Religious exemptions created by legislative enactment and by informal executive-branch practice have been central to the American experience of religious liberty since the seventeenth century.[115] If in fact there is nothing special about religion that justifies protecting religious liberty, then there may be no more justification for legislative protections than for judicial or constitutional protections.

Third, it is illusory to distinguish the right to worship from the right to engage in other religious practices. To the Supreme Court, a worship service is just another form of religiously motivated conduct.[116] Four of the last five free exercise cases in the Supreme Court have been about worship services—three about the right to perform the central ritual of the worship service,[117] and one about the right to build a space in which to conduct the worship service.[118]

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113. Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

114. *See* Davis v. Beason, 133 U.S. 333 (1890) (upholding a test oath that required voters to swear they were not members of any organization that taught polygamy or taught or practiced celestial marriage, that they did not themselves teach any person to commit polygamy, and that they believed that the laws were supreme over the teachings of any organization); *see also* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding revocation of the church's corporate charter and forfeiture of most of its property, although the church itself had obviously never committed polygamy).

115. *See* Laycock, *supra* note 23, at 1803–25 (reviewing exemptions in the colonial period); McConnell, *supra* note 23, at 1466–73 (same).

116. *See* Emp't Div. v. Smith, 494 U.S. 872, 877 (1990) (distinguishing protected "belief and profession" from less protected "physical acts," and illustrating "physical acts" with examples of "assembling with others for a worship service" and "participating in sacramental use of bread and wine").

117. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (consumption of hoasca, a mild hallucinogenic; decided under Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2006)); Church of the Lukumi Babalu

Fourth, I have not discussed the threat to religious speech, but speech may not be safe either. In Canada, religious teachings about same-sex relationships have repeatedly been penalized as hate speech.[119] Free speech protections in the United States are more robust, but judicial review of viewpoint-neutral regulation of speech is so deferential that there are often ways to limit speech in practice.

Live disputes illustrate the dangers. Professor Amos Guiora at the University of Utah argues in a recent book that religious speech is especially dangerous and should be less protected than secular political speech.[120] Guiora spent much of his career doing counter-terrorism work for the Israeli military;[121] he is writing from that experience and not from the American free speech tradition. But he is a respected figure making a serious argument, and he will have readers.

American secularists have long argued that the Establishment Clause imposes special restrictions on religious speech such that it must be, or at least that it may be, excluded from limited public forums. They have generally lost on that argument, but some of the decisions were 5–4.[122] And last Term, the Supreme Court allowed a public university to exclude the Christian Legal Society ("CLS") from meeting on campus, or using campus channels of communication, because CLS required a quite conventional statement of faith as a condition of voting membership.[123] This routine step to preserve religious authenticity was treated as prohibited discrimination, against non-Christians and against gays and lesbians.[124] And the emphasis was on the gays and lesbians. This decision was very much a product of the battle between religious liberty and the gay rights movement.

Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (animal sacrifice); *Smith*, 494 U.S. 872 (consumption of peyote).

118. City of Boerne v. Flores, 521 U.S. 507 (1997) (expansion of church prohibited because church included in historic district). The remaining free exercise case is *Locke v. Davey*, 540 U.S. 712 (2004), a challenge to the exclusion of theology majors from a generally applicable scholarship program. Another case is pending; it tests the right of churches to select their own ministers. Equal Emp't Opportunity Comm'n v. Hosanna-Tabor Evangelical Lutheran Church and Sch., 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (2011).

119. *See* Stern, *supra* note 45, at 2–7 (describing cases from Canada and other western democracies).

120. AMOS N. GUIORA, FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY 29–57 (2009).

121. *Id.* at x.

122. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (5–1–3, effectively 5–4); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (5–4); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

123. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

124. *Id.* at 2980.

Various footnotes and parenthetical quotations make clear, without much explanation, that the Court treated the university's rule as a regulation of conduct and not as a restriction on speech.[125] But the fact is that a group organized around an idea at the core of the First Amendment was excluded from campus for asking its voting members to actually support its idea. *That* is a free speech problem, whatever the Court's unstated rationale for holding otherwise. CLS was not banned for its conduct, as that term had been used in earlier cases, "but for its *identity*: for who CLS is and whom it chooses to associate with."[126] A group sufficiently committed to articles of religious faith would not be allowed to function on the campus. If a student chapter of the NAACP had required a statement of support for its core commitments at the University of Alabama in 1964, it is inconceivable that the Court would have ruled the same way.

The resistance to religious liberty that I have discussed today has consequences, and those consequences may unfold in new kinds of regulation, in refusal of religious exemptions, in more vigorous enforcement against religious organizations and believers, and in other ways not easily foreseen.

SOME CONCLUDING THOUGHTS

A serious search for antidotes or solutions would be a different lecture. Let me briefly mention some general directions. The religious community cannot take religious liberty for granted. It needs to expend a lot more energy defending the right to religious liberty, and it would help to spend a lot less energy attacking the liberty of others.[127]

Abortion is a special case. But the conflicts between believers and nonbelievers, and between religious conservatives and the gay rights movement, have live-and-let-live solutions in the tradition of American

125. *See id.* at 2987 n.15 (stating that issue was "reasonable standards respecting conduct" (quoting Healy v. James, 408 U.S. 169, 193 (1972))); *id.* at 2988 (stating that officials can "prescribe and control conduct in the schools" (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969))); *id.* at 2990 (stating that university could decline to subsidize "conduct of which the people of California disapprove"); *id.* at 2995 n.27 (stating that university can impose regulations "that incidentally burden religious conduct").

126. Brief for American Islamic Congress *et al.* as Amici Curiae Supporting Petitioners, at 6, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371).

127. *See* Dallin H. Oaks, Elder of the Quorum of the Twelve Apostles of the Church of Jesus Christ of Latter-Day Saints, Preserving Religious Freedom, Speech at Chapman Univ. Sch. of Law (Feb. 4, 2011), *available at* http://newsroom.lds.org/article/elder-oaks-religious-freedom-Chapman-University. Oaks's argument is principally in religious terms, emphasizing the value and social importance of religious faith and religious organizations. He argues that believers should more vigorously defend religious liberty; he does not say they should spend less time attacking the liberty of others.

liberty.[128] Unfortunately, neither side seems much interested in those solutions. At least one colleague who read this article in draft thought he detected a tone of exasperation with the groups on his side of the argument. I suppose he was half right. Whether the right word is exasperation, or frustration, or simply disagreement, these feelings are very much directed at both sides. Neither side in the culture wars seems much interested in protecting the liberty of the other side.

I am part of a small group of academics arguing for strong gay rights legislation with strong religious liberty exemptions, and for same-sex marriage legislation with strong religious liberty exemptions.[129] We mostly get the hostility of both sides. The religious side wants no gay rights and no same-sex marriage, and the gay rights side wants no religious exemptions beyond the clergy person at the wedding ceremony. Both sides seem unable to believe that anyone could sincerely support both gay rights and religious exemptions.

It might take only a few swing votes in some states to do a deal protecting gay rights and religious liberty, but those swing votes have been extremely hard to find. Even so, we have gotten somewhat expanded protections for religious organizations in some of the recent legislation.[130]

Similarly, with respect to believers and nonbelievers, I have argued in earlier work that there are secular justifications for religious liberty—to avoid the human suffering inherent in enforced legal penalties or in coerced violation of conscience, and to avoid the social conflict that inevitably arises from attempts to inflict such suffering.[131] These reasons still have force today, even if they had even more force in the sixteenth century. 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.[132] If we claim the right to enforce

128. *See* Douglas Laycock, *Afterword*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 45, at 189, 192–201 (exploring ways to protect the freedom of both gays and religious believers).

129. *See Memos/Letters on Religious Liberty and Same-Sex Marriage*, MIRROR OF JUSTICE (Aug. 2, 2009), http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html. *See also* 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*, UC DAVIS LEGAL STUDIES RESEARCH PAPER SERIES (2010), *available at* http://ssrn.com/abstract=1725610 (arguing for same-sex marriage with religious exemptions, but for exemptions considerably narrower than what my group has been advocating).

130. *See* D.C. CODE § 46-406(e) (2010); N.H. REV. STAT. ANN. § 457:37(III) (LexisNexis 2010); 2011 N.Y. Laws ch. 96, to be codified as N.Y. DOM. REL. §§ 10-b, 11.1-a; VT. STAT. ANN. tit. 9, § 4502(*l*) (2011).

131. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 316–19 (1996).

132. *Id.* at 314–15.

only the constitutional rights we like, then no constitutional right is safe from shifting public opinion.

I have also argued that we have to understand religion broadly, so that nonbelievers are protected when they do things that are analogous to the exercise of religion.[133] Nonbelievers have teachings about religion that the government should not establish. Nonbelievers speak and publish their teachings about religion. Nonbelievers form organizations that are entitled to autonomy and that need places to meet. Nonbelievers have consciences, and occasionally, their deeply held conscientious beliefs conflict with government regulation.

The principal line of religious conflict in America today is along a continuum of religious intensity, from intense believers at one end to intense nonbelievers at the other. The Religion Clauses should mediate that conflict just as they mediated Protestant-Catholic conflict, and Protestant-Protestant conflict, in earlier generations.

Every part of this has been a tough sell. Neither believers nor nonbelievers want to say that nonbelievers have something that might be, for constitutional purposes, a religion. The nonbelievers are convinced that protecting religion discriminates against the nonreligious, and they do not often reconsider. But maybe the most common reaction is that the secular reasons for religious liberty are just too attenuated.

John Garvey is a distinguished religious liberty scholar, now the President of Catholic University. He once said that "It is possible to imagine a society of skeptics insisting on a free exercise clause, but the idea is far-fetched."[134] To me, that is a sad and pessimistic thought. The whole idea of religious liberty is that we all agree to protect the exercise of religious faiths we do not share. That commitment has been seriously stressed at times in our past, and it is seriously stressed in new ways today. But it is a commitment very much worth saving.

I want to leave you with a story. It happened during the ugly protests against the proposed Islamic cultural center in lower Manhattan. A medical student named Michael Rose approached one of these protests with a sign that said "Religious tolerance is what makes America great."[135] Under the circumstances, that turned out to be a controversial claim. As the *New York Times* tells the story, "An argument broke out, punctuated by angry fingers pointed in the student's face. One man, his cheeks red, leaned in and hissed that if the police were not present, Mr. Rose would be in danger."[136] The police dragged Mr. Rose away. They made him return to the separate area, a block away, reserved for the project's supporters.

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133. *Id.* at 326–37.

134. Garvey, *supra* note 90, at 291.

135. Michael N. Grynbaum, *Proposed Muslim Center Draws Protesters on Both Sides of the Issue*, N.Y. TIMES, Aug. 23, 2010, at A14, *available at* 2010 WLNR 16770713.

136. *Id.*