Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century

Douglas Laycock*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1047</td>
</tr>
<tr>
<td>I. The Reformation Era</td>
<td>1049</td>
</tr>
<tr>
<td>A. The Continent</td>
<td>1049</td>
</tr>
<tr>
<td>B. England</td>
<td>1055</td>
</tr>
<tr>
<td>C. The United States</td>
<td>1066</td>
</tr>
<tr>
<td>II. Contemporary Religious Conflict</td>
<td>1069</td>
</tr>
<tr>
<td>III. Comparing the Two Eras</td>
<td>1089</td>
</tr>
<tr>
<td>A. The Source of Persecution</td>
<td>1089</td>
</tr>
<tr>
<td>B. Reductions in Force and in the Stakes of Competition</td>
<td>1095</td>
</tr>
<tr>
<td>C. The Changing Motives and Expanded Role of Government</td>
<td>1096</td>
</tr>
<tr>
<td>Conclusion</td>
<td>1102</td>
</tr>
</tbody>
</table>

INTRODUCTION

What is the source of threats to religious liberty? One might also ask the question the other way around: What is the problem that religious liberty is designed to solve?

For nearly five hundred years in Western thought, the

* Alice McKean Young Regents Chair in Law and Associate Dean for Research, The University of Texas School of Law. This paper was originally given as the 1994 Lockhart Lecture at the University of Minnesota Law School. I have added footnotes and expanded on the text, but I have tried to retain some of the scope and style of the original lecture. Many volumes of history have been written on the Reformation; I have resisted the illusion that I can do any more than summarize broad themes and illustrate with selected examples. I am grateful to the students and faculty at Minnesota for insightful questions and comments, to Edward McGlynn Gaffney, Andrew M. Greeley, Sanford Levinson, Michael McConnell, L.A. Powe, and John Witte for helpful comments on an earlier draft, and to Nathan Adams and Christine Burgess for research assistance. The seed for this paper was planted in conversation at a conference sponsored by the Liberty Fund; the papers from that conference are forthcoming in RELIGIOUS LIBERTY IN WESTERN THOUGHT (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996).
dominant model of the problem to be solved has been the religious conflict in the wake of the Reformation. The Reformation is important to American constitutional law because it was salient recent history to those who wrote our Religion Clauses, and because for most Americans who learned anything about religion in their history courses, the problem of religious liberty is typified by the persecutions that drove Pilgrims, Puritans, Quakers, and Catholics to found colonies in Plymouth, Massachusetts Bay, Pennsylvania, and Maryland.

The Reformation-era conflict was in some ways similar to religious conflict before and since. But like all great events, it was in some ways unique. As Justice Black summarized it in *Everson v. Board of Education*:

> Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. . . . [M]en and women had been fined, cast in jail, cruelly tortured, and killed.  

We can all agree that these events should not be repeated. These events were so obviously evil that the lessons to be learned may seem equally obvious—so obvious that there is little need to discuss them.

The relative dearth of explicit discussion has been a mistake. I have gradually come to realize that different commentators have drawn quite different lessons from this history. Americans do not agree on what was wrong with the Reformation-era conflicts, and consequently we do not agree on what lessons to draw for our own time. In part we can disagree about what lessons to draw because we have only the vaguest idea what actually happened. Just what was the Diet of Worms, and who forced whom to live on it?

More important, what was the dominant evil of these conflicts? Was it that people suffered for religion, or that religions imposed suffering? Is the dominant lesson that religion has a "dark side" that is "inherently intolerant and persecutory," or that efforts to coerce religious belief or practice cause great human suffering?

Any answer must begin with historical facts, not vague

---

1. 330 U.S. 1, 9 (1947).
impressions or religious or secular prejudices. I therefore begin with some basic history. Nothing in this historical review is original or sophisticated, and few of the facts are controversial. I am summarizing from standard sources in very broad strokes. But there is a theme to my summary: the role of the State in the religious persecutions that gave rise to our Religion Clauses. I follow with an equally broad overview of contemporary religious conflict; then I compare and contrast the two periods. Much has changed since the Reformation, but one constant is that the State punishes people for disapproved religious practices.

I. THE REFORMATION ERA

A. THE CONTINENT

The beginning of the Reformation is conventionally dated to 1517, when Martin Luther circulated his Ninety-Five Theses on indulgences. Of course Luther had predecessors, such as Wycliffe and Hus more than a century before. But it was Luther and then Calvin who first launched successful religious movements, perhaps because they had the enormous advantage of the printing press.

The Ninety-Five Theses circulated widely, although historians now doubt the legend that Luther nailed them to the church door in Wittenberg. The Theses provoked immediate accusations of heresy, but only dilatory action. There followed more than three years of political maneuvering, during which time Luther issued a series of books, sermons, and public statements that escalated his quarrel with Rome from an attack on indulgences to a denial of the authority of popes and church councils and a redefinition of the sacraments and the means of

5. See H.G. HAILE, LUTHER: AN EXPERIMENT IN BIOGRAPHY 165-74 (1980) (describing the explosive distribution of Luther's works); SPITZ, supra note 3, at 88-93 (“[T]he Reformation was the first historical movement in the post-Gutenberg era and the printing press made it possible.”).
7. See SPITZ, supra note 3, at 66-69 (noting that the Theses were promulgated October 31, 1517, and that by mid-December, Luther's bishop had sent them to Rome with a request for heresy proceedings).
salvation.\textsuperscript{8}

The reasons for the delay in pursuing Luther lay in secular politics and power relations. The Church had to line up its temporal support, because only the State could execute heretics. And the Pope had to deal with the rulers of the German states on other issues—including revenue, a proposed Crusade, and the election of a new Holy Roman Emperor—that seemed more important than one heretic monk.\textsuperscript{9} Eventually, Pope Leo X declared Luther to be a heretic and excommunicated him,\textsuperscript{10} but even then he and his representatives continued to delay the effective date of the decree.\textsuperscript{11}

Charles V, the new emperor, summoned Luther before the Diet—the imperial council—meeting in the City of Worms, and demanded that he recant.\textsuperscript{12} It was here, before this secular body, that Luther made his famous reply: "Here I stand, I cannot do otherwise."\textsuperscript{13} It was an innovation that the Diet exercised independent judgment on a question of heresy, but it was no innovation that only "the secular arm" could execute a heretic.\textsuperscript{14}

Luther had come to Worms under a guarantee of safe conduct, which the Emperor honored.\textsuperscript{15} The Edict of Worms gave Luther twenty-one days in which to flee, at the end of which he was "to be regarded as a convicted heretic," his

\textsuperscript{8} For detailed accounts of this period, see generally ROLAND H. BAINTON, HERE I STAND: A LIFE OF MARTIN LUTHER 84-166 (1950) [hereinafter BAINTON, LUTHER]; JOHN M. TODD, LUTHER: A LIFE 120-86 (1982) [hereinafter TODD, LUTHER].


\textsuperscript{10} The papal bull is quoted in BAINTON, LUTHER, supra note 8, at 147.

\textsuperscript{11} See id. at 170, 177 (reporting that the Pope's representative to the Emperor returned the bull of excommunication to Rome for modification); BAINTON, REFORMATION, supra note 9, at 58-59 (reporting an earlier delay for delivery of the bull to Luther, plus sixty days in which Luther could recant, plus further delay for "political considerations").

\textsuperscript{12} BAINTON, LUTHER, supra note 8, at 178-86; SPITZ, supra note 3, at 74-75.

\textsuperscript{13} There is some doubt whether he said those words, but there was no doubt of his meaning. See BAINTON, LUTHER, supra note 8, at 185 (quoting a similar statement from the transcript, and the famous quotation from the earliest printed version); SPITZ, supra note 3, at 75 (quoting the printed version and stating that "[p]landemonium broke loose in the hall" after Luther spoke).

\textsuperscript{14} J.D. MACKIE, THE EARLIER TUDORS 1485-1558, at 549 (1952); EDWARD PETERS, INQUISITION 67, 94 (1988).

\textsuperscript{15} SPITZ, supra note 3, at 74-75.
followers "condemned," and his books "eradicated from the memory of man." But the decree could not be enforced; Luther had too much support, and the Empire was little more than a loose confederation. At first Frederick of Saxony offered Luther refuge and protection; later, Luther returned to Wittenberg and gradually concluded that the authorities were afraid to try to arrest him. In 1524, the Diet of Nurnberg decreed only that "the Edict of Worms should be enforced in so far as might be possible."

Protestantism spread rapidly, quickly splitting into its most basic branches. Lutheranism spread through much of Germany and all of Scandinavia; Calvinism spread from Geneva to the French Huguenots, the Dutch Reformers, the English Puritans, the Scots Presbyterians, and the American colonies in New England. The Anabaptists (today's Mennonites, Amish, Quakers, and the like), the radical wing of the Reformation, spread across Europe but dominated nowhere. Some scholars would add the Anglicans as a fourth distinct branch, a unique combination of Lutheran, Calvinist, Catholic, and nationalist elements.

Protestantism spread in part for religious reasons: charis-
matic evangelizers offered an attractive alternative, in vernacular languages, to a Church that had grown visibly corrupt. But Protestantism also spread for political reasons—it offered princes a legitimate excuse to repudiate bishops, to eliminate a competing source of authority in their domain, and to consolidate their power. It spread for economic reasons—local money would not have to be sent to Rome, and local princes could seize the lands of monasteries, convents, and bishops. It spread for dynastic and sexual reasons—Henry VIII in England needed a legitimate male heir, and he wanted to marry his mistress, but the Pope would not cooperate.

In the Peace of Augsburg, Catholics and Lutherans reached an accommodation within the Holy Roman Empire. Each ruler in the empire would choose the religion of his realm; all his subjects would have to conform or emigrate. The historian Will Durant has written that “Protestantism was nationalism extended to religion.” Protestantism was more than that, but that is surely part of what it was. The same nationalist forces were at work in countries that remained Catholic, and Catholic kings established large measures of control over national

26. See Bainton, Reformation, supra note 9, at 12-21 (summarizing the secularization and corruption of the Church); Todd, Reformation, supra note 4, at 244 (arguing that the Reformation was “primarily a religious event, something which happened because large numbers of men entertained or did not entertain particular religious beliefs,” and that various secular causes were merely the nonessential occasions for religious change); Tuchman, supra note 9, at 51-126 (reviewing the papal follies from 1470 to 1530). On the emotional appeal of Protestantism, see Steven E. Ozment, The Reformation in the Cities 47-120 (1975).

27. See Bainton, Reformation, supra note 9, at 156 (concluding that the spread of Lutheranism to Scandinavia was primarily motivated by politics); Will Durant, The Reformation 438-41 (1957) (summarizing the political and economic forces that propelled Protestantism).

28. For accounts of seizures of property, see Durant, supra note 27, at 439-40 (seizures of church buildings and land in Germany), 563-78 (seizures of English monasteries), 625 (seizures of monastic lands in Sweden); G.R. Elton, Reform and Reformation: England, 1509-1558, at 230-49 (1977) (detailing seizure of the English monasteries). Luther’s lieutenant, Philip Melanchton, complained that “[u]nder cover of the Gospel the princes were only intent on the plunder of the churches.” Durant, supra note 27, at 440.

29. Bainton, Reformation, supra note 9, at 185-91; see also Spitz, supra note 3, at 119-20 (reporting that Luther secretly authorized a bigamous marriage for a Lutheran prince); Durant, supra note 27, at 449 (telling the same story with somewhat different emphasis).

30. Bainton, Reformation, supra note 9, at 155; Spitz, supra note 3, at 122-23.

31. Durant, supra note 27, at 457.
churches with significant independence from Rome.\textsuperscript{32} It is revealing of the relative importance of religious and secular loyalties that in 1527 an army of the Catholic Emperor Charles V sacked Rome, looted the Vatican, and held the Pope for ransom.\textsuperscript{33}

The principle of Augsburg, and the de facto rule throughout Europe, was "cuius regio, eius religio"—whose the rule, his the religion.\textsuperscript{34} This principle made the State supreme over fundamental religious choices, and to the extent it could be enforced, it required State suppression of minority faiths and made the population of each state religiously uniform. The logical extreme of this principle was Erastianism, or state supremacy over the established Church,\textsuperscript{35} and England and some of the Lutheran states in Germany reached this extreme.\textsuperscript{36} But ruler's choice did not inevitably lead to Erastianism; the State might give more or less independence to the church that it established. Calvinists avoided Erastianism; Calvin developed a theory of church and state as separate and independent entities with separate responsibilities, and no individual could hold both religious and political positions.\textsuperscript{37} But this was hardly separation of church and state:\textsuperscript{38} the State enforced religious uniformity,\textsuperscript{39} and when the Puritans developed their democratic version of this model, only members of the established Church could vote or hold political office.\textsuperscript{40}

\textsuperscript{32} See \textit{id.} at 141-42.

\textsuperscript{33} SPITZ, \textit{supra} note 3, at 116; TUCHMAN, \textit{supra} note 9, at 121-24.

\textsuperscript{34} SPITZ, \textit{supra} note 3, at 122.

\textsuperscript{35} See BAINTON, \textit{REFORMATION}, \textit{supra} note 9, at 236-38 (outlining the extent of Erastianism in England). The name comes from the Swiss theologian Thomas Erastus.

\textsuperscript{36} See SPITZ, \textit{supra} note 3, at 362-63 (describing arrangements such as city council control of local churches in Germany and royal control of the church in England). For more on England, see \textit{infra} text accompanying notes 57-60.


\textsuperscript{38} See John Witte, Jr., \textit{Moderate Religious Liberty in the Theology of John Calvin}, in \textit{RELIGIOUS LIBERTY IN WESTERN THOUGHT}, \textit{supra} note * (explaining that Calvin's approach differed vastly from the modern American idea of separation of church and state).

\textsuperscript{39} BOUWSMA, \textit{supra} note 37, at 211-13; see Witte, \textit{supra} note 37, at 56 (describing Massachusetts laws requiring Sabbath observance and church attendance, and forbidding blasphemy and idolatry).

\textsuperscript{40} Witte, \textit{supra} note 37, at 59, 62.
Of course, religious uniformity could not always be enforced. Success depended on the number of religious dissenters, the strength of the government, the relative determination of government and dissenters, and the ease or difficulty of emigration. German states remained religiously uniform into the nineteenth century, perhaps because emigration to another German state was relatively easy. In France, the Edict of Nantes proclaimed toleration for Calvinists in 1598, ending a generation of civil war, executions, and reciprocal assassinations in the failed pursuit of uniformity. But in 1685 Louis XIV revoked the Edict and actively persecuted Protestants, driving many of them out of France and many more into real or feigned conversions. Political and religious developments fueled a demand for persecution at that time; the increased power of the central government made it possible.

In Spain and Italy, reform movements flourished briefly before the Inquisitions vigorously and effectively suppressed them. But neither the Inquisition nor thousands of death sentences from the Duke of Alba’s irregular secular tribunal could stop reform in the Low Countries, where Calvinism and Dutch nationalism united in resistance to Catholicism and Spanish rule. The ultimate solution in the Low Countries was territorial division, the creation of what is now the Netherlands (Protestant) and Belgium (Catholic).

In Germany, the Peace of Augsburg lasted more or less from 1555 to 1618, finally collapsing at the outbreak of the Thirty Years War. The war began with a wonderfully named incident, the Defenestration of Prague (from “fenestra,” meaning

41. See Spitz, supra note 3, at 122.
42. For a summary of incidents preceding the Edict, see Bainton, Reformation, supra note 9, at 162-72. On the French experience to the mid-1550s, see Spitz, supra note 3, at 192-203.
44. See Bainton, Reformation, supra note 9, at 131-40; Peters, supra note 14, at 95, 107, 110-11; Spitz, supra note 3, at 233-35.
45. See William S. Maltby, Alba: A Biography of Fernando Alvarez de Toledo, Third Duke of Alba, 1507-1582, at 153-58 (1983) (concluding that the Council of Troubles condemned nearly 9000 to death, but executed only 1083, the rest having fled the country).
46. Bainton, Reformation, supra note 9, at 173-78.
47. See id. at 155 (explaining the principles and ambiguities of the Peace of Augsburg and the reasons for its end).
"window"), the throwing-out-the-window of Prague. \(49\) Local representatives threw two emissaries of the Emperor out a second story window; with religious and political tensions already high, that act sparked a war that lasted thirty years and eventually involved most of Europe. In general, subject to the conflicting political interests of each ruler, the war pitted Catholic states against Protestant states. \(50\) But the decisive intervention came when Catholic France allied with Protestant Sweden against the Catholic Emperor, thereby fatally weakening France's traditional enemy Spain, and illustrating once again that the needs of the State were more important than the needs of the Church. \(51\)

### B. ENGLAND

Of course to the American Founders, the English experience was most salient, and I want to review that experience in greater detail. An exhaustive French history of the Reformation concludes a nation-by-nation account with the statement that, "[a]mong all the countries that were divided by the Reformation,... England comes in last so far as tolerance is concerned." \(52\) It is far beyond the scope of my research to accept or reject this claim, but certainly it is plausible. Another fact seems relatively clear: the State dominated the Reformation in England to a greater extent than anywhere else in Europe. Causation is speculative, but it seems reasonable to believe that the State's dominance at least contributed to the duration and severity of religious conflict in England.

Henry VIII authored a pamphlet refuting Luther, and in 1521, the Pope rewarded him with the title Defender of the Faith. \(53\) Elizabeth II claims that title still. But by the later 1520s, Henry was in an escalating feud with the Catholic Church over the Pope's refusal to annul his marriage to Cather-

---

50. Id. at 82.
51. See id. at 148-61. For a table showing the participation of 17 European states, and the side or sides they fought on from time to time, see id. at 155.
52. JOSEPH LECLER, TOLERATION AND THE REFORMATION 493 (1960). The formulation seems designed to exclude those countries where the Reformation never became a substantial force, such as Spain and Italy.
53. BAINTON, REFORMATION, supra note 9, at 192; SPITZ, supra note 3, at 246.
ine of Aragon. That marriage had produced no son who survived infancy, Catherine was at the limits of child-bearing age, and Henry had long since abandoned her bed. The Pope would likely have bent doctrine to accommodate Henry and save England for the Church, but for the inconvenient fact that Catherine was the aunt of Charles V—Emperor and King of Spain, with the military power to sack Rome—and Charles loomed much larger than Henry in the Pope's political calculations.

By a series of statutes in the 1530s, Parliament gave Henry sole power to appoint bishops, enacted that Henry was sovereign over Church and State in England, required all bishops to swear oaths acknowledging his supremacy, and gave civil commissioners jurisdiction over heresy trials. Royal advisers and popular pamphleteers contended to push Henry and England toward or away from genuine Protestantism. The Protestants made some progress, but Henry's theology remained predominantly Catholic except for papal supremacy. His break with Rome was not based on religious differences; he persecuted those who challenged his takeover of the Church or the validity of his second marriage and also those who chal-

54. BAINTON, REFORMATION, supra note 9, at 185-91.
55. Id. at 186; ANTONIA FRASER, THE SIX WIVES OF KING HENRY VIII 92-93, 151-52 (1992). On the strongly felt need for a son and not just daughters, see ELTON, supra note 28, at 104-05, 178-79; MACKIE, supra note 14, at 325.
56. BAINTON, REFORMATION, supra note 9, at 187-88; ELTON, supra note 28, at 107; TUCHMAN, supra note 9, at 120.
58. Supremacy Act, 1534, 26 Hen. 8, ch.1 (Eng.), reprinted in DOCUMENTS ILLUSTRATIVE, supra note 57, at 243, 243-44.
60. Six Articles Act, 1539, 31 Hen. 8, ch. 14 (Eng.), reprinted in DOCUMENTS ILLUSTRATIVE, supra note 57, at 303, 307-14. For summaries of this and related statutes, see MACKIE, supra note 14, at 349-60.
61. For a summary, see SPITZ, supra note 3, at 236-49, 262-67. For a detailed account of every ebb and flow of the Protestant tide, see generally ELTON, supra note 28.
62. See Six Articles Act, 1539, 31 Hen. 8, ch. 14 (Eng.), reprinted in DOCUMENTS ILLUSTRATIVE, supra note 57, at 303 (giving firmly Catholic answers to six disputed questions of faith, and declaring contrary answers heretical). For an analysis of the answers, see ELTON, supra note 28, at 287-88.
lenged Catholic doctrine on other grounds. Many victims were executed, Thomas More the most famous among them.

The Pope proclaimed Henry a heretic, placed England under interdict, released all English subjects from their allegiance to the Crown, and commanded them and all Christian princes to depose Henry. It had little effect; power was in the State and not in the Church. Catholic sovereigns on the continent refused to let the Church promulgate the interdict in their realms. The claimed power of Popes to interfere with kings was a dangerous doctrine indeed, and Catholic kings would not publicize it to their subjects.

Henry had quickly and successfully established the Erastian model in England; State dominance in religious matters was thereafter widely assumed. But religious battles for control of the State were just beginning. Few on either side had yet grasped the idea of tolerance. Equally important, if the State controls religion, then religions must fight for control of the State. Protestant-Catholic conflict was a major part of English politics for two hundred years, and even today, economic and political conflict in Northern Ireland largely follows Protestant-Catholic lines.

Under Henry's son, Edward VI, and Thomas Cranmer as Archbishop of Canterbury, the Church of England became more theologically Protestant. Cranmer promulgated the Book of Common Prayer, and the Acts of Uniformity required all persons...

63. BAINTON, REFORMATION, supra note 9, at 198-99.
64. See ELTON, supra note 28, at 128-29, 180-81, 191-94, 283 (recounting executions of both leaders and followers from both the Protestant and the Catholic factions); MACKIE, supra note 14, at 361-63 (describing the executions of Sir Thomas More, Cardinal Fisher, a charismatic woman who prophesied the King's death if he divorced Catherine, and the followers of this woman).
65. DURANT, supra note 27, at 558.
66. Id.
67. For the exceptions, see HENRY KAMEN, THE RISE OF TOLERATION (1967) (recounting the history of this period with emphasis on those individuals and groups who urged toleration).
69. See BAINTON, REFORMATION, supra note 9, at 199-203; MACKIE, supra note 14, at 507-22; TODD, REFORMATION, supra note 4, at 329-37.
to worship at services conducted in that form and no other.\textsuperscript{70} Only two heretics were burned in Edward's reign, but many Catholics were imprisoned, and priests who adhered to the old forms or doctrines were removed from office.\textsuperscript{71}

Edward died in 1553 at the age of fifteen.\textsuperscript{72} His regents attempted to crown Henry's Protestant great niece, Lady Jane Grey,\textsuperscript{73} but Parliament, the people, and a large majority of those with troops to command rallied round Edward's half-sister Mary Tudor, Catherine's daughter, a Catholic and the rightful heir.\textsuperscript{74} She initially proclaimed toleration,\textsuperscript{75} but within a year, she had forbidden the Protestant worship service\textsuperscript{76} and ordered the suppression of heresy.\textsuperscript{77} After her plans to marry Philip of Spain provoked an unsuccessful insurrection,\textsuperscript{78} or perhaps merely as soon as she had the means at hand,\textsuperscript{79} she became a far more vigorous persecutor than Henry ever had been; she is remembered as Bloody Mary.\textsuperscript{80} Some three hundred Protestants were executed in her five years on the throne, including

\begin{itemize}
\item First Edwardine Act of Uniformity, 1549, 2 \& 3 Edw. 6, ch. 1 (Eng.), reprinted in DOCUMENTS ILLUSTRATIVE, supra note 57, at 358; Second Edwardine Act of Uniformity, 1552, 5 \& 6 Ed. 6, ch. 1 (Eng.), reprinted in DOCUMENTS ILLUSTRATIVE, supra note 57, at 369.
\item DURANT, supra note 27, at 585.
\item MACKIE, supra note 14, at 526.
\item For a full account, see generally MARY LUKE, THE NINE DAYS QUEEN: A PORTRAIT OF LADY JANE GREY (1986).
\item See MACKIE, supra note 14, at 526-30 (describing Mary's ascension to the throne). For an account of Mary's reign, see generally D.M. LOADES, THE REIGN OF MARY TUDOR: POLITICS, GOVERNMENT, AND RELIGION IN ENGLAND, 1553-1558 (1979).
\item See Queen Mary's First Proclamation About Religion, 1553, reprinted in DOCUMENTS ILLUSTRATIVE, supra note 57, at 373, 373-74 (proclaiming that, though she would prefer all of her subjects to be Catholic, she would not compel them to be so at this time).
\item Mary's First Act of Repeal, 1553, 1 Mary, stat. 2, ch. 2 (Eng.), reprinted in DOCUMENTS ILLUSTRATIVE, supra note 57, at 377, 379 (forbidding any form of worship service other than that "most commonly used, ministered, and frequented in the said last year of the reign of the said late King Henry VIII").
\item Injunctions of Queen Mary, 1554, reprinted in DOCUMENTS ILLUSTRATIVE, supra note 57, at 380, 381.
\item MACKIE, supra note 14, at 536-40. The causal connection is asserted in DURANT, supra note 27, at 593.
\item See MACKIE, supra note 14, at 540-42, 549 ("[F]rom the very first she took it to be her duty to restore England to the bosom of Rome."); see also ELTON, supra note 28, at 383 ("Mary's desire to do away at once with the abominations of heresy and schism had to bow before the legal and political difficulties.").
\item DURANT, supra note 27, at 600.
\end{itemize}
Cranmer and the other Protestant leaders. But the persecutions appear to have alienated far more people than they intimidated.

Mary was succeeded in 1558 by her half-sister Elizabeth, a Protestant. Elizabeth's first Parliament reinstated the Book of Common Prayer and the Act of Uniformity. Failure to attend the Anglican worship was punishable by fine, attendance at the Catholic Mass by fine and imprisonment. Any person who converted to Catholicism committed a capital offense, as did any Catholic priest who remained in England. Enforcement waxed and waned with political circumstance through Elizabeth's reign and through most of the next century. For their part, Catholics produced a large body of teaching about how far one could feign Protestantism without committing sin.

See Bainton, Reformation, supra note 9, at 204-06 (reporting 288 burnings and numerous Protestant deaths in prison during Mary's reign); Elton, supra note 28, at 382-89 (describing the "exceptionally bloody" persecution under Mary); Mackie, supra note 14, at 549-53 (reviewing the persecution with special attention to the more famous martyrs); Spitz, supra note 3, at 275-76 (emphasizing Cranmer's martyrdom). For the classic account, see generally John Foxe, Foxe's Book of Martyrs (G.A. Williamson ed., 1965) (originally published in 1563 as Acts and Monuments of Matters Most Special and Memorable Happening in the Church, Especially in the Realm of England).

See Elton, supra note 28, at 387-89 (describing the persecutions as a "monumentally disastrous mistake"); Loades, supra note 74, at 333-34 ("The persecutions failed, and could be seen by contemporaries to be failing."); Mackie, supra note 14, at 560 ("Mary left . . . people disgusted with the faith that had kindled the fires of Smithfield.").


Act of Uniformity, 1559, 1 Eliz., ch. 2 (Eng.), reprinted in Documents Illustrative, supra note 57, at 458.

Black, supra note 83, at 184.

See Act Against Jesuits and Seminarists, 1585, 27 Eliz., ch. 2 (Eng.), reprinted in Documents Illustrative, supra note 57, at 485 (ordering all priests to leave England within 40 days of the Act's proclamation); see also Black, supra note 83, at 185 (detailing the severe sanctions against Catholic priests during Elizabeth's reign).

See Black, supra note 83, at 185-86 (summarizing the scope and motives of anti-Catholic persecution by Elizabeth's government); Godfrey Davies, The Early Stuarts 1603-1660, at 204-14 (2d ed. 1959) (describing "fitful" and "intermittent" enforcement of anti-Catholic laws under James I, Charles I, and Cromwell, with fewer than 60 executions in 57 years).

See Robert E. Rodes, Law and Modernization in the Church of England: Charles II to the Welfare State 81-85 (1991) (summarizing these
Elizabeth never married. For the first thirty years of her reign, the heir to the throne was her cousin Mary Stuart, Mary Queen of Scots. This Mary too was Catholic, the youthful widow of a King of France, and Queen in her own right of Protestant Scotland; she abdicated her throne and fled to England in 1568, throwing herself on Elizabeth's mercy. Elizabeth held Mary as a prisoner, under gentle conditions in country estates, unwilling to kill her and afraid to set her free. Mary's continued life was a threat to Elizabeth's, because the assassination of Elizabeth would restore a Catholic to the throne, and any Catholic in Europe might be tempted to act on that knowledge. Finally, in 1587, Elizabeth had Mary executed for treason, on charges of plotting against the life of the Queen. Now the heir to the throne was Mary's son James, who had been separated from his mother in infancy and raised as a Scots Calvinist.

Philip II, King of Spain and widower of Mary Tudor, responded to Mary Stuart's execution by finally launching the Spanish Armada. If England could not be restored to the Church by succession, it must be restored by force—besides, England was a rich prize, and Philip would have the King of France surrounded. But bad weather and English sailing skill destroyed the Armada. It is revealing that many English casuistry books).

91. See id. at 376-77 (noting that the Pope had authorized assassination of heretic rulers); MATTINGLY, supra note 89, at 6-7 (noting public demand for Mary's death).

92. See BLACK, supra note 83, at 379-87 (reviewing the “overwhelming, irrefutable” evidence of Mary's guilt); MATTINGLY, supra note 89, at 1-5 (telling the story of Mary's execution).

93. See BLACK, supra note 83, at 110, 374-75 (discussing the reasons for and conditions of Mary's imprisonment).

94. See id. at 376-77 (noting that the Pope had authorized assassination of heretic rulers); MATTINGLY, supra note 89, at 6-7 (noting public demand for Mary's death).

95. See MATTINGLY, supra note 89, at 69, 80-81 (noting that news of Mary's death reached Philip on March 23, 1587, and that a flurry of orders and correspondence for the Armada was issued on March 31).

96. On Philip's mixed motives, see BLACK, supra note 83, at 389-91; MATTINGLY, supra note 89, at 81.

97. The best account is MATTINGLY, supra note 89, and a summary can be found in BLACK, supra note 83, at 389-405.
Catholics fought valiantly for their Protestant Queen, despite her suppression of their worship.\textsuperscript{98} They might have preferred an English Catholic on the throne, and a Catholic majority in Parliament, but they were Englishmen, with no desire for a Spanish conquest.

By the time of Elizabeth's death in 1603, England was irretrievably Protestant, and most Catholics accepted the fact.\textsuperscript{99} But some on both sides continued to believe that to control the religion of the Crown would be to control the religion of the country, and the Catholic population contained extremists who had not given up. In 1605, five Catholics dug a tunnel and placed thirty tons of gunpowder under the Houses of Parliament, planning to blow it up on opening day, when the King and all his ministers would be in attendance.\textsuperscript{100} The plot was revealed and the plotters were executed. The plotter actually found in the chamber with the gunpowder was Guy Fawkes, and England still celebrates Guy Fawkes Day on November 5.\textsuperscript{101}

But the Catholics were no longer the most serious threat to Anglican dominance. There were also the Puritans, English Calvinists who viewed the Church of England as far too Catholic. They too rejected the Uniformity Acts and the Book of Common Prayer. In 1593, Parliament enacted two parallel statutes, the Act Against Puritans\textsuperscript{102} and the Act Against Recusants\textsuperscript{103} (the term for Catholics who refused to attend the Anglican

\begin{itemize}
\item \textsuperscript{98} BLACK, \textit{supra} note 83, at 389.
\item \textsuperscript{99} See id. at 451-57 (reviewing the growth among Catholic priests of a movement to make some accommodation with the government); CHRISTOPHER HILL, \textit{GOD'S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION 14-15} (1970) (arguing that the security of Protestant dominance was prerequisite to the intra-Protestant conflict of the next century).
\item \textsuperscript{100} See DAVIES, \textit{supra} note 87, at 8; TRIAL OF GUY FAWKES AND OTHERS (Donald Carswell ed., 1934) [hereinafter TRIAL] (reprinting the extant records of the trial of the conspirators, with an introduction that summarizes the known and disputed facts).
\item \textsuperscript{101} Guy Fawkes, in ACADEMIC AMERICAN ENCYCLOPEDIA (Grolier Electronic Publishing 1991). My English friends assure me that the holiday has lost any serious content; it has become the equivalent of Halloween. TRIAL, \textit{supra} note 100, at 1. That is not the case with annual commemorations of the Battle of the Boyne, a 1690 battle between Protestant and Catholic armies in Ireland. See GEORGE CLARK, \textit{THE LATER STUARTS 1660-1714}, at 306-08 (2d ed. 1965) (discussing the battle). The Battle of the Boyne is still enthusiastically celebrated in Northern Ireland. BELL, \textit{supra} note 68, at 50-51.
\item \textsuperscript{102} Act Against Puritans, 1593, 35 Eliz., ch. 1 (Eng.), \textit{reprinted in DOCUMENTS ILLUSTRATIVE, supra} note 57, at 492.
\item \textsuperscript{103} Act Against Recusants, 1593, 35 Eliz., ch. 2, \textit{reprinted in DOCUMENTS ILLUSTRATIVE, supra} note 57, at 498.
\end{itemize}
service). Throughout the reigns of James I and Charles I, intra-Protestant conflict steadily escalated, culminating in civil war.\textsuperscript{104}

The English Civil War of the 1640s was partly political and economic, partly religious. It was for the rights of Parliament and the middle class against Stuart absolutism and the hereditary aristocracy, but it was also Puritans against Anglicans, Catholics, and Scots Presbyterians. The religious causes were inextricably linked with the others;\textsuperscript{105} arguably the religious causes dominated.\textsuperscript{106} One of the royalist slogans was “No bishop, no king,” the point being that Puritan demands for abolition of bishops would lead in time to abolition of the monarchy as well.\textsuperscript{107} Charles I was married to a Catholic daughter of the King of France, because pursuit of strategic alliances through royal intermarriage had outweighed religious considerations for his Protestant father. But a Catholic Queen rendered the royal family suspect just as the high-church Anglicans were retreating from some Calvinist doctrines, especially predestination. Puritans accused the royal family and the leading bishops of reintroducing “popery.”\textsuperscript{108} And in the end, when the victorious Puritans attempted to negotiate a settlement with their captured King, it was the religious issues that could not be resolved.\textsuperscript{109}

Charles I lost his head,\textsuperscript{110} and Oliver Cromwell ruled

\begin{footnotes}
\footnotesize
\begin{enumerate}
\item \textsuperscript{104} See generally ROBERT ASHTON, THE ENGLISH CIVIL WAR: CONSERVATISM AND REVOLUTION 1603-1649 (2d ed. 1989) (assessing the Civil War and its causes); DAVIES, supra note 87, at 1-159 (tracing English history from the accession of James I to the execution of Charles I).
\item \textsuperscript{105} See generally HILL, supra note 99, at 13-34 (summarizing the 40 years prior to the Civil War).
\item \textsuperscript{106} See John Morrill, The Religious Context of the English Civil War, 34 ROYAL HIST. SOCIY TRANS. (5th Series) 155, 178 (1984) (“The English Civil War was not the first European Revolution; it was the last of the Wars of Religion.”); see also ASHTON, supra note 104, at 98-99 (accepting Morrill’s conclusion).
\item \textsuperscript{107} THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 2 (1986); DAVIES, supra note 87, at 70-71.
\item \textsuperscript{108} See DAVIES, supra note 87, at 57-60, 68-74 (“[M]ost Englishmen continued to believe that the restoration of popery was an ever present threat.”); HILL, supra note 99, at 26-27, 32 (noting Charles’s unwillingness to intervene in the Thirty Years War, and the Catholicizing influence of Archbishop Laud, Queen Henrietta, and other Catholics at court).
\item \textsuperscript{109} ASHTON, supra note 104, at 337-39.
\item \textsuperscript{110} Id. at 3; DAVIES, supra note 87, at 156-59.
\end{enumerate}
\end{footnotes}
England for a decade. Under Cromwell the Puritan worship service was established, but the laws requiring attendance were repealed, and at least in England the Puritans made only limited efforts to enforce the prohibitions on Catholic and Anglican services. But they vigorously enforced their Sabbath laws and other moral legislation, alienating the populace in the attempt. Catholics fared much worse in Ireland, where Cromwell slaughtered priests and massacred the inhabitants of two cities in his vicious reconquest.

One of his biographers attributes the different treatment of English and Irish Catholics to the fact that Catholicism no longer seemed a political threat in England, but that it was obviously associated with political rebellion in Ireland.

The Puritan victory was only a military victory by a highly motivated minority, and England never became Puritan. Charles II was restored to the throne shortly after Cromwell's death, after some military maneuvering but without bloodshed, and to general popular acclaim. Charles entered into a secret treaty with Louis XIV, promising to announce his own Catholicism and "reconcile himself with the Church of Rome as soon as the welfare of the kingdom would permit," in exchange for cash payments from France. This Charles, son of Charles I and his Catholic wife, may have been a secret Catholic; more important, he desperately needed the money. But he never performed his end of the bargain, perhaps rightly judging that the welfare of the kingdom would not permit it.

111. See generally DAVIES, supra note 87, at 160-236.
112. Id. at 198-204, 210-13; see HILL, supra note 99, at 121.
113. See DAVIES, supra note 87, at 304-15 (stating that the measures "imposed a yoke heavier than most Englishmen would bear").
114. DAVIES, supra note 87, at 161-63; HILL, supra note 99, at 116-17, 121-22.
115. HILL, supra note 99, at 121-22.
116. DAVIES, supra note 87, at 314.
117. Id. at 251-60.
118. See CLARK., supra note 101, at 76 (summarizing the treaty of Dover); ANTONIA FRASER, ROYAL CHARLES: CHARLES II AND THE RESTORATION 275-76 (1979) (quoting the treaty).
119. A biographer concludes that any conversion happened late in life, perhaps on his deathbed, FRASER, supra note 118, at 149-152, 451-55, although some of her evidence is consistent with the view that Charles's need for secrecy precluded any overt Catholic practice, even in private. What he believed and when he believed it cannot be known.
120. See CLARK, supra note 101, at 76 (noting "the perpetual inadequacy of parliamentary grants").
Parliament and not the King was making religious policy, and Parliament restricted religious liberty in this reign. Quakers were imprisoned in large numbers for violating new restrictions on nonconforming worship services, and the Test Act of 1672 barred from public office all but Anglicans.121

The most bizarre outbreak of persecution was in response to the so-called Popish Plot.122 The real plot originated with two informants who made wholly fictitious allegations of a Catholic plot to assassinate the King. There is ample evidence that the King himself did not believe the charges, and the principal accuser was later convicted of perjury after public opinion subsided. But in the meantime, some thirty-five Catholics were executed for treason and similar crimes. The incident is noteworthy for its use of wholly neutral and secular laws to accomplish a religious persecution.

When Charles II died in 1685, the crown passed to his brother James. James was openly Catholic,123 but the Protestant Parliament acquiesced in his ascension to the throne. England had just been through civil war and regicide; few were eager to repeat the experience. James’s daughter Mary was a Protestant married to another Protestant, William of Orange;124 one Catholic reign could be endured.

James appointed Catholics to high office, raised a royal army with mostly Catholic officers, supported Catholic bishops with royal funds, permitted the founding of new Catholic institutions, and proclaimed toleration by royal decree.125 His Declaration of Indulgence purported to authorize public worship for all sects and to abolish all test oaths and religious penalties.126 But this was suspect in its motives (was he really for tolerance, or only for Catholicism?) and unpopular in its policy—Protestants were not ready for tolerance.127 Perhaps

121. Id. at 17-27, 80.
122. See id. at 93-95.
123. Id. at 117.
124. LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 108 (1981); see CLARK, supra note 101, at 126-27. William was nephew and son-in-law to James II, first cousin and husband to Mary. For the Stuart family tree, see FRASER, supra note 118, at 6-7.
125. CLARK, supra note 101, at 121-25.
127. See CLARK, supra note 101, at 117 ("The attempts of Charles II to bring in general toleration had shown that nothing was more likely to divide the
most important, the Declaration asserted an unacceptable claim of royal prerogative to override Acts of Parliament.\textsuperscript{128} James prosecuted seven Anglican bishops for refusing to order the Declaration of Indulgence read in the churches, and a jury acquitted.\textsuperscript{129} By now, King and country were wholly at odds. The last straw came in 1688, when the Queen gave birth to a son who would be raised as a Catholic and would take the crown ahead of Mary.\textsuperscript{130}

Leading Englishmen invited William to invade England, and William's army drove James from the throne without a battle.\textsuperscript{131} William and Mary were crowned jointly, with William exercising the powers of the office; the winners called it the Glorious Revolution. Parliament enacted a Bill of Rights,\textsuperscript{132} which set out a range of civil liberties and parliamentary rights and also provided that no Catholic and no one married to a Catholic could ever inherit the throne of England.\textsuperscript{133} Liberty and anti-Catholicism were thus inextricably linked.

The same Parliament enacted full toleration for all Protestants, redeeming a promise to the Protestant dissenters that if they spurned James's Declaration of Indulgence, they would be granted toleration when James was gone.\textsuperscript{134} But the Act specifically excluded "any papist or popish recusant whatsoever, or any person that shall deny in his preaching or writing the doctrine of the blessed Trinity."\textsuperscript{135} The exclusion of those who denied the Trinity was aimed at Unitarians\textsuperscript{136} and was not enforced against the Jews. Cromwell had readmitted the Jews

\textsuperscript{128} See Durant & Durant, supra note 127, at 291-93.
\textsuperscript{129} Id. at 291-94.
\textsuperscript{130} Clark, supra note 101, at 126-27; Schwoerer, supra note 124, at 109.
\textsuperscript{131} See Clark, supra note 101, at 133-43 (summarizing the revolution); Stuart E. Prall, The Bloodless Revolution: England 1688, at 89-242 (1972) (describing the reign and overthrow of James II).
\textsuperscript{132} Bill of Rights, reprinted in Documents Illustrative, supra note 57, at 645.
\textsuperscript{133} Id. at 652-53. See generally Schwoerer, supra note 124 (discussing the development and passage of the Declaration of Rights and the Bill of Rights).
\textsuperscript{134} Prall, supra note 131, at 147, 154.
\textsuperscript{135} The Toleration Act, 1689, 1 Wm. & Mary ch. 18, reprinted in Documents Illustrative, supra note 57, at 654, 663.
\textsuperscript{136} See Kamen, supra note 67, at 211 (noting that "the penal laws were held to be in force, particularly against Catholics and Unitarians").
to England, and there have been synagogues in London continuously since 1662.

By 1700, it appeared that the Protestant branch of the Stuart line would die without heirs and that the Catholic branch would again succeed to the throne. Parliament anticipated the impending crisis with the Act of Settlement, naming a German granddaughter of James I, and her Protestant heirs, as the next heirs to the throne of England. Thus did England acquire George I, Elector of Hanover and King of England, a German who rarely spoke English. Better than a Catholic.

In 1745, the Stuart pretender Bonnie Prince Charlie landed in Scotland and raised the clans to invade England and claim his throne. This doomed venture was a mix of Catholicism, Scots nationalism, and personal ambition for the throne. The last Catholic claimant to the throne of England was defeated, and his army slaughtered on the field at Culloden Moor, 215 years after Henry's break with Rome, and within the living memory of the American Founders.

C. THE UNITED STATES

The story of religious conflict in the American colonies, and the emergence of constitutional guarantees of religious liberty, is much better known in the American legal literature, and there is little need to rehearse it here. Suffice it to say that the American colonies repeated European mistakes on a smaller scale. There were established churches in New England and the southern colonies. In New England, religious dissidents

---

137. Davies, supra note 87, at 214.
138. Clark, supra note 101, at 36.
142. Id. at 193-219.
144. See Curry, supra note 107, at 105-07.
such as Roger Williams were expelled. Those who returned, such as Quaker missionaries, were occasionally executed. As late as the 1770s, Virginia imprisoned Baptist preachers for preaching without a license. In both New England and the south, religious minorities were taxed to support the established Church.

America also inherited England's fear of Catholicism. Colonists took the occasion of the Glorious Revolution to overthrow royal governors in New England and New York, and Lord Baltimore's Catholic government in Maryland, alleging as part of the justification in each case a fantastic international plot to Catholicize the continent. In 1746, when the news of Culloden Moor reached America, the famous Methodist evangelist George Whitefield preached a sermon of thanksgiving for God's delivering Britain and her colonies from the "abominations of the whore of Babylon." The Declaration of Independence cites the Quebec Act as one of England's dangerous assaults on American liberties, what the Act had done was to protect Catholicism in a conquered Catholic province. John Jay unsuccessfully proposed to banish Catholics from New York. When Catholics did arrive in large numbers, in the mid-nineteenth century, serious religious conflict ensued. The Protestant Bible controversy led to mob violence and church burnings.

145. Id. at 19.
146. See id. at 102, 135.
147. Id. at 105-07.
149. George Whitefield, Sermon VI: Britain's Mercies, and Britain's Duty, in George Whitefield, Sermons on Important Subjects 87, 91 (1832).
150. See The Declaration of Independence para. 22 (U.S. 1776) ("... For abolishing the free System of English Laws in a Neighboring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rule into these Colonies ... "); see also Curry, supra note 107, at 133 (noting that American colonists "reacted to the Quebec Act with frenzied accusations that it imposed tyranny and an establishment of Catholicism and endangered the entire continent").
151. An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America, 1774, 14 Geo. 3, ch. 83, § 5 (Eng.), reprinted in 30 Pickering's Statutes 549, 551 (1773) (providing that Quebec citizens may enjoy the "free exercise of religion" of the church of Rome subject to the King's supremacy).
152. Curry, supra note 107, at 162.
153. For a highly condensed account of the Protestant Bible controversy, which collects multiple historical sources, see Laycock, Noncoercion, supra note
a wave of state constitutional amendments forbidding the grant of public funds to sectarian schools, and a failed attempt to amend the federal Constitution. Anti-Catholic bigotry was pervasive for much of American history, an equally vigorous anti-Protestantism was at the core of Catholic teaching.

As late as 1960, John Kennedy's Catholicism was still a serious issue in a Presidential election, but that election also seemed to put the issue to rest. Kennedy successfully addressed the religious issue in a speech to the Greater Houston Ministerial Association, a speech that was filmed and shown repeatedly throughout the campaign. Kennedy won the election, even though twenty-five percent of Americans had said in a 1958 poll that they opposed a Catholic nominee for President. Kennedy got fewer Protestant votes than a Democrat should have expected, but more Catholic votes; the net effect was to prove that a Catholic was electable. By 1987, the percentage saying they opposed a Catholic nominee for President

143, at 50-52.
154. For a list of these amendments, see CARL ZOLLMAN, AMERICAN CHURCH LAW §§ 65-66, at 78-80 (2d ed. 1983).
155. See ANSON P. STOKES, 2 CHURCH AND STATE IN THE UNITED STATES 68-69 (1950) (quoting the Blaine Amendment, which would have codified the Protestant position by authorizing Bible reading in public schools but forbidding public funding of sectarian schools).
157. See Jay P. Dolan, Catholic Attitudes Toward Protestants, in UNCIVIL RELIGION, supra note 156, at 73 ("[T]he very definition of Catholicism included rejection of Protestantism as an erroneous and thus inferior religion.").
159. THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1960, at 259-61, 391-93 (1961) (describing the speech and reprinting the text). The speech is still a powerful statement on behalf of religious liberty and against religious tests for public office. Whether out of conviction or expediency, he committed himself to the "absolute" separation of church and state, to an absolute ban on government funds for religious institutions, and to restrictions on political statements by clergy. Id. at 391. Debate whether religious liberty entails these positions of course provokes very different divisions today than it did in 1960.
was down to eight percent. 162

Soon after the Kennedy election came the Second Vatican Council, an even bigger turning point in Protestant-Catholic relations. The Council attributed the Reformation and the other great schisms of history to sin on both sides, 163 accepted non-Catholics as fellow Christians with a relationship to the Church and the prospect of salvation, 164 and "exhort[ed] all the Catholic faithful to...participate skillfully in the work of ecumenism." 165 Anti-Protestantism largely disappeared from Catholic rhetoric; anti-Catholicism became disreputable on the Protestant side. After nearly five hundred years, the fierce conflicts of the Reformation seemed to have finally played out in the United States. 166

II. CONTEMPORARY RELIGIOUS CONFLICT

The pattern of religious conflict in the United States today is in some ways very different from that of the Reformation era. But in some ways the core of the problem remains the same. I begin with an overview of the current situation, even sketchier than my overview of the Reformation, and then turn to comparisons between the two periods. Not everything in this overview of the present can be proved or even cited to conventional sources; some characterizations are based on personal impressions after working closely for nearly twenty years with people from all points of the spectrum on these issues.

162. Id.
164. Id.; see also Dogmatic Constitution on the Church, in THE DOCUMENTS OF VATICAN II, supra note 163, at 33-34 (acknowledging that Christians not in union with Rome are, even so, "joined with us in the Holy Spirit"). It is perhaps more remarkable that the Council acknowledged the prospect of salvation for Jews, Muslims, and other non-Christian believers in God, and even for "those who, without blame on their part, have not yet arrived at an explicit knowledge of God, but who strive to live a good life, thanks to His grace." Id. at 35. This doctrine has become a point of controversy with conservative Protestants who insist that salvation requires faith in Christ. See Resolutions for Roman Catholic and Evangelical Dialogue, reprinted in J.I. Packer, Crosscurrents Among Evangelicals, in EVANGELICALS AND CATHOLICS TOGETHER: TOWARDS A COMMON MISSION 147, 158 (Charles Colson & Richard John Neuhaus eds., 1995) [hereinafter EVANGELICALS AND CATHOLICS TOGETHER].
165. Decree on Ecumenism, supra note 163, at 347.
166. Compare TODD, REFORMATION, supra note 4, at 346 ("Towards the end of the nineteenth century the Reformation gale [in Europe] seemed at last to be blowing itself out."). In Latin America, the conflict may be just beginning.
Will Herberg's classic 1955 book, Protestant-Catholic-Jew, suggested that the United States had solved the problem of religious conflict, and that it had achieved substantial consensus on religious matters.¹⁶⁷ Herberg saw a "civil religion" with the three principal branches named in his title.¹⁶⁸ His analysis of Protestant-Catholic and Christian-Jewish conflict was right, as the Kennedy election and consequences of Vatican II dramatically confirmed. But he missed another fault line, just below the surface and ready to erupt.

The 1960s introduced a period of dramatic reaction against some of the traditional values of all three faiths: the sexual revolution, the pornography decisions and the emergence of a sexual entertainment industry, the women's movement, the abortion decisions, the gay-rights movement, the school-prayer decisions, the drug scene, hippies, the counter-culture, dramatic increases in divorce and illegitimacy, and a general reaction against authority. Mass demonstrations, the civil-rights movement, the anti-war movement, and the criminal-procedure decisions were less religiously salient, but were equally alienating to many of the social conservatives who were also among the traditionally religious.

All of these developments contributed to the political activation of evangelical Christians and eventually to their successful alliance with other elements of the Reagan coalition;¹⁶⁹ this movement in turn led to a counter-reaction by civil liberties organizations, some Jewish organizations, and others who thought that the evangelicals were a serious political threat. The bitter national debates over abortion and gay rights reactivated anti-Catholic feeling, but the basis was no longer Protestantism. The new anti-Catholics were feminists, gay activists, and civil libertarians, and their open hostility was

---

¹⁶⁸. Id. at 263. Herberg described the "three equi-legitimate religious communities grounded in the common culture-religion of America" as America's "civic religion." Id. at 259.
equally directed at evangelical Protestants.\textsuperscript{170}

The result is a polarized debate that extends to a wide range of religious liberty issues and also to social issues such as pornography, abortion, feminism, and gay rights.\textsuperscript{171} Both sides have mastered the techniques of fundraising and constitutional litigation. Secular civil liberties organizations and Jewish organizations repeatedly line up against evangelical organizations in litigation and in legislative lobbying. Each group attempts to enlist the educational system on its side, so that controversies over education have been one of the most prolific sources of religious liberty litigation. These controversies include religious observance\textsuperscript{172} and curriculum\textsuperscript{173} in the pub-

\textsuperscript{170} For examples of anti-Catholicism, see Edward McGlynn Gaffney, Jr., \textit{Hostility to Religion, American Style}, 42 DEPAUL L. REV. 263, 279-93 (1992); for a book-length anti-Baptist hate tract, see ARTHUR FREDERICK IDE, \textit{EVANGELICAL TERRORISM: CENSORSHIP, FALWELL, ROBERTSON AND THE SEAMY SIDE OF CHRISTIAN FUNDAMENTALISM} (1986). Fundraising appeals provide frequent examples. \textit{See, e.g., Contribution Memorandum from Americans United for Separation of Church and State (1995) ("I agree that we must stop the Christian Coalition, the Roman Catholic hierarchy, and their allies from destroying public education and demolishing the church/state wall.") (on file with the Minnesota Law Review); Letter from Edd Doerr, Executive Director, Americans for Religious Liberty, to members and supporters (Oct. 1995) ("Televangelist Pat Robertson's so-called Christian Coalition and its sectarian special interest allies are growing in strength and posing increasingly serious threats to religious freedom, public education, interfaith harmony, and democratic government.") (on file with the Minnesota Law Review). For a much more careful and nuanced argument that religion is a negative force on balance, see Mary E. Becker, \textit{The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective}, 59 U. CHI. L. REV. 453, 458-86 (1992) ("[R]eligion perpetuates and reinforces women's subordination, and religious freedom impedes reform."). For examination of the theoretical underpinnings of hostility to religion, see Frederick M. Gedicks, \textit{Public Life and Hostility to Religion}, 78 VA. L. REV. 671 (1992) (arguing that liberal theory excludes religion from public life); Michael W. McConnell, "God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age, 1993 B.Y.U. L. REV. 163 (arguing that liberalism and post-modernism both exclude religion from public life, reducing religious liberty to a Nietzschean right to "sing, weep, laugh, and mumble" in private).

\textsuperscript{171} \textit{See generally} HUNTER, \textsuperscript{supra} note 160 (assessing the contemporary "culture wars").

\textsuperscript{172} \textit{See, e.g.,} Lee v. Weisman, 505 U.S. 577 (1992) (holding that public schools may not offer prayers as part of official high school graduation exercises); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (holding that student religious clubs may meet on school premises); School Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (holding that public schools may not offer religious exercises in classroom).

\textsuperscript{173} \textit{See generally} WARREN A. NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA (1995) (reviewing the widespread conflict
lic schools, and financing\textsuperscript{174} and regulation\textsuperscript{175} of private schools.

There have been important examples of cooperation and compromise, including the Williamsburg Charter,\textsuperscript{176} a Joint Statement on Religion in the Public Schools,\textsuperscript{177} and the spectacularly successful Coalition for the Free Exercise of Religion, in which religious and civil liberties organizations and liberals

over how religion should be treated in the public school curriculum, and showing that it is rarely treated at all; George W. Dent Jr., Of God and Caesar: The Free Exercise Rights of Public School Students, 43 CASE W. RES. L. REV. 707 (1993) (arguing for the free exercise right to exempt students from public-school instruction inconsistent with their religious beliefs). See, e.g., Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994) (holding that the Impressions reading series does not establish witchcraft as a religion); Fleischfresser v. Director of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994) (rejecting a similar Establishment Clause challenge to the Impressions series); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (holding that parents have no free exercise right to remove their children from elements of public school curriculum that are in conflict with their faith), cert. denied, 484 U.S. 1066 (1988); Coleman v. Caddo Parish Sch. Bd., 635 So.2d 1238 (La. App. 1994) (holding that sex education curriculum can make no moral or ethical judgments), writ denied, 639 So.2d 1171 (La. 1994).

174. See, e.g., Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that a deaf student entitled to a sign-language interpreter at public expense in public school may use that interpreter at a church-affiliated private school); Aguilar v. Felton, 473 U.S. 402 (1985) (holding that federally funded remedial instruction cannot be offered on the premises of church-affiliated schools); Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that public funds may not be used to pay teachers at church-affiliated schools); Miller v. Benson, 68 F.3d 163 (7th Cir. 1995) (per curiam) (deferring issues arising out of voucher plan for education to pending state-court litigation).

175. See, e.g., EEOC v. Kamehameha Schools, 990 F.2d 458 (9th Cir.) (holding that school that hired only Protestant teachers was not sufficiently religious to qualify for exemption from laws against religious discrimination in employment), cert. denied, 114 S. Ct. 439 (1993); New Life Baptist Church Academy v. East Longmeadow, 885 F.2d 940 (1st Cir. 1989) (collecting cases upholding state regulations that assure minimum educational quality), cert. denied, 494 U.S. 1066 (1990); Kentucky State Bd. for Elem. & Sec. Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979) (holding that intrusive state regulation of private schools violated state constitution), cert. denied, 446 U.S. 938 (1980); State v. Whisner, 351 N.E.2d 750 (Ohio 1976) (holding that pervasive regulation of private schools violated the U.S. Constitution).


177. AMERICAN JEWISH CONGRESS ET AL., RELIGION IN THE PUBLIC SCHOOLS: A JOINT STATEMENT OF CURRENT LAW (Apr. 1995). Drafting and endorsing organizations include the American Civil Liberties Union, the Christian Legal Society, the National Association of Evangelicals, the National Council of Churches, People for the American Way, numerous Jewish organizations, numerous denominational Christian organizations, and Muslim and Sikh organizations. Id.
and conservatives worked together to enact the Religious Freedom Restoration Act. The Coalition worked because in principle the civil liberties organizations support regulatory exemptions for religiously motivated behavior, and because the Coalition took no position on specific applications of the Act, which inevitably would have provoked disagreement over exempting religious minorities from regulation in pursuit of other issues on the civil liberties agenda. Cooperation on selected issues is important and politically healthy, but polarization has been the more common alignment.

James Davison Hunter’s book *Culture Wars* accurately captures much of the new divide. The principal fight is no longer between Catholics and Protestants, or between Christians and Jews, or even between believers and nonbelievers; rather it is between what Hunter calls “orthodox” and “progressive” elements of all these groups. This may just be relabeling of the political split between left and right on social issues, but it has important religious dimensions. In Hunter’s terminology, the orthodox remain committed “to an external, definable, and transcendent authority.” Usually this transcendent authority is religious, but for culturally conservative nonbelievers, it may be natural law or some other source of moral absolutes. The progressives tend to view truth “as a process, as a reality that is ever unfolding.” Religious progressives thus tend to “resymbolize historic faiths according to the prevailing assumptions of contemporary life.”

On the “orthodox” side, a clear illustration of Hunter’s point is that Catholics and evangelicals are on the same side of many moral issues, and some of them are exploring a more formal alliance, despite deep disagreements and suspicions over theology, liturgy, and church authority, and less recognized

180. *Id.* at 42-66; see also Noll, supra note 158, at 91-101 (distinguishing “New” and “Old” Protestants and Catholics, roughly corresponding to Hunter’s progressives and orthodox within those faiths).
181. *HUNTER*, supra note 160, at 44.
182. *Id.* at 45-46.
183. *Id.* at 44.
184. *Id.* at 44-45.
185. See generally *EVANGELICALS AND CATHOLICS TOGETHER*, supra note 164.
186. For the depth of the theological differences, see Packer, supra note 164.
but measurable differences in ways of thinking about the world. The leading proponents of the current alliance come from the theologically and socially conservative wings of both Catholicism and Protestantism; with important exceptions, these are the groups who were most suspicious of the Protestant-Catholic rapprochement in the 1960s and who attach the greatest importance to theological differences today. But today's alliance between Protestant and Catholic conservatives may not have been possible if the liberals on each side had not made peace a generation ago.

I think that Hunter accurately describes the two principal sides in the culture wars, although he may give insufficient attention to the moderates in the middle. The activists on each side, and the audiences for whom their fundraising letters are tailored, are far more polarized than the bulk of the population; there is substantial diversity both in the middle and within each broadly defined "side." There are even moderate activists; groups such as the National Council of Churches and the Baptist Joint Committee on Public Affairs file briefs first on one side and then on the other.


188. See Andrew M. Greeley, With God on Their Sides, N.Y. TIMES BOOK REV., Nov. 24, 1991, at 13, 14 (reviewing JAMES D. HUNTER, CULTURE WARS (1991), and concluding that "the American people's reaction to cultural conflicts is much more complex, nuanced, ambiguous and ambivalent than any two-category typology might suggest"). I do not disagree with Greeley's analysis, but I think that Hunter captures one important divide of special relevance to the law of religious liberty.

An important part of the new situation is the significant number of avowed nonbelievers and of believers whose belief is subordinated to a largely secular view of the world. The historian James Turner has shown that true atheism did not become intellectually possible until the nineteenth century. The political effects of this development were delayed much longer, but they eventually came. Freud and Dewey gave skeptical foundations to whole disciplines, and evolution and its skeptical interpretations became the subject of popular debate, legislation, litigation, plays, and movies. Modernist versions of Christianity sought to reconcile religious faith with the new developments in science, philosophy, and public values.

See generally James Turner, Without God, Without Creed (1985) (tracing social, religious, and intellectual trends that set the stage for modern atheism).

See generally John Dewey, A Common Faith (1934) (rejecting all religious claims of supernatural reality, and proposing a religion based on faith in the accumulated values of human civilization); Sigmund Freud, The Future of an Illusion (James Strachey trans., 1961) (first published in 1927) (arguing that all religious ideas are creations of human imagination).

and eventually came to emphasize good works more than faith. Phillip Johnson is surely right that "millions of people who consider themselves theists . . . have to some extent adopted modernist ways of thinking," by which he means a naturalistic and rationalist worldview that dominates public discourse and excludes or marginalizes supernatural explanations. Johnson argues that this worldview is ultimately inconsistent with theism; it at least makes God a remote abstraction with little relevance to practical affairs.

Johnson's modernists and Hunter's progressives are overlapping but far from identical groups. There are religious progressives for whom God is a real and immediate presence in their lives. They are as committed as the orthodox to carrying out God's will, but they interpret that will differently. Their God may put more emphasis on feeding the hungry, sheltering the homeless, and correcting injustice, and they may conclude (or understand God to now reveal), that the traditional sexual morality of orthodox religion is itself a source of injustice to gays and lesbians, or that the absolute right to life is a source of injustice to women and of unnecessary suffering among the terminally ill. And of course there are devout believers who understand their God to command large elements of both the progressive and orthodox agendas—both the traditional religious concern for the poor and the traditional sexual morality and commitment to life at all stages. There are as many permutations and gradations of belief as there are persons in the population, but it can still be useful to identify and label important sources of agreement and disagreement. Hunter's progressives are identified by the belief that the moral rules of religious tradition are changeable; Johnson's modernists are identified by a worldview in which supernatural interventions are remote or nonexistent.

The more militant progressive secularists are the functional equivalent of a new religious movement, and sometimes the legal equivalent as well. For constitutional purposes, important elements of secularism must be considered religious, because any answer to religious questions must be "religion" within the meaning of the First Amendment. Is there a God? Does He or

---

195. Id. at 37-38.
She care about human beings? Is there an afterlife? Are there supernatural forces at work in the universe? The believer says yes, the humanist manifestos quite explicitly say no, the agnostic says it is impossible to say, and the indifferent dismiss the question as utterly irrelevant to anything that matters. The State cannot persecute any of these answers; neither can it establish any of them. State-imposed atheism on the Soviet model would violate any sensible interpretation of the Establishment Clause; persecution of atheists would violate any sensible interpretation of the Free Exercise Clause.

Religious progressives and secular progressives disagree about most matters of theology, but they agree on one important point that can be put in theological terms: No God handed down in eternally unchanging form all of the moral rules associated with traditional religion. On the issue of divine authority for traditional moral values, religious and secular progressives are on the same side.

Characterizing the dispute in religious terms also fits the sociological reality. The culture wars of the last thirty years are very like the battles of the Reformation with a substantial reduction in levels of force. In the Reformation and in our time, a new set of answers to eternal questions became sufficiently widespread to destabilize social arrangements. Then the new answers were the various versions of Protestantism; today the new answers are the various versions of secularism and progressive or modernist religion.

The claim of a culture war is in seeming tension with survey data, which overwhelmingly indicate that overall levels of religious belief and participation are not much changed from

196. See Paul Kurtz et al., A Secular Humanist Declaration 18 (1980) ("[W]e find that traditional views of the existence of God either are meaningless, have not yet been demonstrated to be true, or are tyrannically exploitative. . . . In spite of the fact that human beings have found religions to be uplifting and a source of solace, we do not find their theological claims to be true."); Humanist Manifesto I, reprinted in Corliss Lamont, The Philosophy of Humanism 285, 286 (7th ed. 1990) ("Humanism asserts that the nature of the universe depicted by modern science makes unacceptable any supernatural or cosmic guarantees of human values."); Humanist Manifesto II, reprinted in Lamont, supra, at 290, 292-93 ("We find insufficient evidence for belief in the existence of a supernatural. . . . [W]e can discover no divine purpose or providence for the human species. . . . No deity will save us; we must save ourselves. . . . Promises of immortal salvation or fear of eternal damnation are both illusory and harmful.")
earlier generations. So why do so many believers feel under siege? Part of the explanation is that Hunter’s religious progressives and Johnson’s theistic modernists show up as believers in opinion polls, but are often on the secular side of culture war issues; part of the explanation is that nonbelievers are disproportionately in elite positions, where they have disproportionate influence on public discourse.

Certainly nonbelief has become respectable among elites; indeed, I have the subjective sense that the burden of justification has shifted, and now the question is whether it is intellectually respectable to believe. I remember reading newspaper stories (before I was in the job market myself, so this was probably in the 1960s) about how it was bad for your corporate career not to attend church—preferably a mainline Protestant church. Today the career incentives appear to have switched; it is conventional wisdom among believing lawyers that church-affiliated volunteer work should be omitted from resumes, although it appears still to be true that mainline Protestant churches are more acceptable on resumes than evangelical or Catholic churches.

I share Stephen Carter’s sense that many in the elite view religion as trivial. Data are hard to come by, but anecdotal evidence abounds. I have heard several colleagues say that religious claims are absurd, ridiculous, irrational, or unworthy of respect. I have never heard a colleague, at any of the three law schools where I have taught, make a religious claim in an academic context. When the student chapter of the Christian Legal Society at The University of Texas needed a speaker, I


198. For a similar view, see Michael Novak, The Conservative Mood, 31 Society 13, 19 (Jan. 1994) ("Increasingly, religion and those who take religion seriously are ridiculed by sophisticated elites.")


201. See, e.g., George M. Marsden, Religious Professors Are the Last Taboo, Wall St. J., Dec. 22, 1993, at A10 (arguing that it is "unacceptable" in many American universities for faculty to state religious views).
knew of only three or four church-attending colleagues on a faculty of sixty-five, none in the evangelical mode the students were seeking.

There may well be others; James Lindgren has survey data showing that a substantial majority of law professors profess conventional Christian or Jewish religious views. These numbers are much higher than either he or I would have guessed based on personal experience in several law schools. One inference is that the believers feel obliged to be quiet about it. Toleration and even respect for nonbelievers is a great advance for human liberty. But disrespect and even intolerance of religious belief is an offsetting loss of equal importance.

Commenting on an earlier draft of this article, Michael McConnell suggested that the historical model for this conflict is not the Reformation at all, but the French Revolution. Among the many commitments of the revolutionaries were science, rationalism, naturalistic explanations, intense anti-clericalism, and a short lived but vigorous and often violent attempt to de-Christianize France. A permanent anti-clerical faction in France was among the Revolution's legacies. The commitment to naturalistic explanations has grown and spread ever since, at least among elites, and modern secularism is often affirmatively hostile to traditional religious belief. I am skeptical of any direct historical connection between the French Revolution and American secularism, but it does seem clear that they share common ancestry in the Enlightenment. Whatever its origins, the conflict between traditional religious believers and those who are fearful of or hostile to traditional belief is one of the central social divides of our time.

The growing influence of secularism does not mean that religion will fade away. This conflict is not likely to end with only secularists, progressives, and theistic modernists remaining; the human need for spiritual explanations runs too deep. Even among those who turn away from traditional faiths, some

---

202. Lindgren mentioned these data in personal conversation in January, 1996. Publication arrangements are pending.
204. See Kennedy, supra note 203, at 376-77, 379, 384-92 (describing nineteenth-century conflicts between this faction and the Catholic Church).
significant portion turn to a new wave of religions outside the Judeo-Christian tradition. These faiths represent a small fraction of all Americans, but they produce a disproportionate share of all religious liberty litigation, because the larger society has not accommodated their beliefs and practices and because they are often fervent about asserting them. These include so-called cults, such as the Unification Church, the Hare Krishnas and the Scientologists, the growing interest in Islam, especially among African-Americans, a new religious assertiveness by American Indians, and the great variety of unorganized spiritualism that goes under the label New Age.

Significant sections of bookstores are devoted to claims of Divine Forces in every human, of multiple planes of existence, and similar claims that are as supernatural and miraculous as anything in traditional religions. On the eve of this lecture, an affiliate of the Book-of-the-Month Club was promoting The Art

205. See, e.g., Larson v. Valente, 456 U.S. 228 (1982) (striking down a Minnesota law that used the percentage of contributions from members and nonmembers to target the Unification Church for special regulation of fund solicitation); Molko v. Holy Spirit Ass'n, 762 P.2d 46 (Cal. 1988) (allowing a trial on claims for fraud and intentional infliction of emotional distress, but not for false imprisonment based on a claim that religious teaching persuaded plaintiffs to remain in Unification Church), cert. denied, 490 U.S. 1084 (1989).


207. See, e.g., Hernandez v. Commissioner, 490 U.S. 680 (1989) (holding that payments for Scientology auditing are not deductible as charitable contributions, absent proof that the IRS discriminated among faiths that charge for religious benefits); Church of Scientology Int'l v. United States Dept. of Justice, 30 F.3d 224 (1st Cir. 1994) (holding that the Justice Department had not sufficiently justified its refusal to disclose records of investigation of fraud against the Church); Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514 (11th Cir. 1993) (striking down parts of a charitable solicitation ordinance), cert. denied, 115 S. Ct. 54 (1994); Wollersheim v. Church of Scientology, 6 Cal. Rptr. 2d 532 (Cal. Ct. App. 1992) (remitting part of a judgment for intentional infliction of emotional distress).

208. See, e.g., O'Lone v. Shabazz, 482 U.S. 342 (1987) (upholding prison work schedule that made it impossible for Muslim inmates to attend Friday services).

of Dreaming by Carlos Castaneda. This is the latest in a series of books claiming "that ours is just one world in a vast cluster of realities—and that we all have the ability, by using body energy and the 'four gates' of dreams, to cross the boundaries and visit these incredible places." Castaneda has reportedly sold eight million books, and a New York Times columnist has written that he "must be taken seriously as one of the important intellectual forces of our time." Only a trivial number of Americans say that their religion is "New Age," but that must be because they do not think of it as a religion, or because they syncretically combine their interest in New Age mysticism with elements of more traditional religion. A fifth to nearly half the population report belief in various supernatural claims associated with New Age—reincarnation, astrology, witchcraft, magical powers, and extra-sensory perception.

At least some humanists understand the persistence of spiritual longings; they have been busily trying to fill the functions of religion. Paul Kurtz has written a secular humanist ethics. Corliss Lamont wrote humanist services for weddings and funerals, with readings from poetry and from carefully selected passages from the Jewish and Christian scriptures. These efforts are entirely appropriate developments of their position; my point is not that the humanists are inconsistent. My point is that they offer express answers to the central questions of religion, directly attacking more traditional answers, and they seek to perform the traditional social functions of religion. The humanists cannot claim a legal status different from any other group answering the same questions, debating the same issues, and performing the same functions.

The Christian right has been claiming unsuccessfully that the schools have established secular humanism. They have

213. NORD, supra note 173, at 193 (collecting survey data).
216. See, e.g., Smith v. Board of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987) (rejecting such a claim); Mary H. Mitchell, Secularism in Public Education: The
lost those suits, but not on the commonly offered ground that secular humanism is not a religion. The schools should win these cases on the ground that they have not taught secular humanist theology. They have not taught that there is no God and that human reason is all we can rely on.  

What the schools have taught is moral and social values associated with secular humanism, and also with modernist versions of other religions: reasoned inquiry, individual judgment, tolerance, sexual permissiveness, etc. Schools in a democracy are entitled to teach these values, if that is what the majority wants, just as they are entitled to teach more traditional values if a majority wants that. Church and State both have spoken to morals throughout our history. On moral questions, we argue and we vote; no other solution is possible in a democracy, even though some moral positions turn out to be inconsistent with some theological positions. We can exempt those with religious reasons for noncompliance with particular laws, but general public policy and the operation of public institutions must inevitably be based on the moral decisions of political bodies.

The principle here is that of Harris v. McRae: A law that coincides with the moral teachings of some religion does not establish that religion.  

This is equally true of Catholic moral teaching and secular humanist moral teaching. Constitutional limits on State enforcement of morals are to be found, if at all, in unenumerated rights to autonomy in certain personal decisions.  

They are not to be found in the Establishment Clause, or in barring certain kinds of political arguments. The First Amendment does not privilege either side in the culture wars.

Yet the idea is seriously afoot that religious arguments are excluded, limited, or at least somehow suspect, in the political

---

Constitutional Issues, 67 B.U. L. REV. 603 (1987) (analyzing these claims and concluding that secular humanism is a religion but that in most cases, it has not been established).

217. See supra note 196 (quoting secular humanist answers to theological questions).

218. 448 U.S. 297, 318-20 (1980) (holding that government policy that accords with the moral teaching of one or more religions does not establish those religions).

process. Bruce Ackerman\textsuperscript{220} Robert Audi,\textsuperscript{221} Christopher Eisgruber,\textsuperscript{222} Kent Greenawalt,\textsuperscript{223} Abner Greene,\textsuperscript{224} William Marshall,\textsuperscript{225} Michael Perry,\textsuperscript{226} Lawrence Solum,\textsuperscript{227} and

\textsuperscript{220} See \textit{generally} Bruce Ackerman, \textit{Social Justice in the Liberal State} (1980) (arguing that political arguments may not presuppose any theory of the good or claim to give any privileged answers). For a powerful debate over the application of this principle to religious arguments, hear Bruce Ackerman, Kent Greenawalt, and Michael McConnell, \textit{The Religious Voice in the Public Square}, Oral Presentation at Association of American Law Schools (Jan. 1996) (recording in collection of Jamail Research Center, The University of Texas School of Law).

\textsuperscript{221} See Robert Audi, \textit{The Place of Religious Argument in a Free and Democratic Society}, 30 San Diego L. Rev. 677 (1993) (arguing that coercive public policy should be based only on accessible reasons, and that religious reasons are not accessible) \textit{[hereinafter Audi, Argument]}; Robert Audi, \textit{The Separation of Church and State and the Obligations of Citizenship}, 18 Phil. & Pub. Affairs 259, 274-96 (1989) (arguing that individuals have a duty not to support legislation unless they are actually motivated by secular reasons).

\textsuperscript{222} See Christopher L. Eisgruber, \textit{Madison's Wager: Religious Liberty in the Constitutional Order}, 89 Nw. U.L. Rev. 347, 362-64 (1995) (arguing that political actors must give publicly accessible reasons for their positions, and that most religious reasons are not publicly accessible).


\textsuperscript{225} See Marshall, \textit{supra} note 2, at 844-45 (arguing for special constraints on religion's role in public decisionmaking).

\textsuperscript{226} See Michael J. Perry, \textit{Love and Power: The Role of Religion and Morality in American Politics} (1991) (arguing that political arguments should be excluded if they claim infallibility or if they are inaccessible to others, and that sectarian religious argument tends to fall in these categories); Michael J. Perry, \textit{Toward an Ecumenical Politics}, 60 Geo. Wash. L. Rev. 599, 599-608 (1992) \textit{[hereinafter Perry, Politics]} (similar arguments); Michael J. Perry, \textit{Religious Morality and Political Choice: Further Thoughts—and Second Thoughts—on Love and Power}, 30 San Diego L. Rev. 703 (1993) (modifying earlier positions and appearing to argue that religious arguments are fully admissible in political debate and may be the basis of political decisions); Michael J. Perry, \textit{Religion in Politics}, 29 U.C. Davis L. Rev. (forthcoming 1996)
Kathleen Sullivan\textsuperscript{228} all have offered versions of this argument. Fortunately, their proposals are generally far more moderate than their rhetoric. Mostly they wind up conceding that religious arguments in politics are protected by the text of the Free Speech and Free Exercise Clauses, and by the constitutional structure of democracy.\textsuperscript{229} I would add that the evidence from the original understanding is equally strong. The evangelical sects who successfully demanded the Establishment Clause certainly were not silencing or disfranchising their members.\textsuperscript{230}

(modifying position again and arguing that religious arguments cannot be the basis of coercive regulation unless supported by at least one secular argument, except that the argument that all humans are sacred is always admissible).

227. See Lawrence B. Solum, \textit{Constructing an Ideal of Public Reason}, 30 SAN DIEGO L. REV. 729 (1993) (arguing that only public reasons can be the basis of coercive regulation, and that religious reasons are not public).


229. See, e.g., GREENAWALT, CONSCIENCE, supra note 223 (formulating his proposals as principles of self-restraint, not as rules of law); Audi, \textit{Argument}, supra note 221, at 700 (stating that his proposed restrictions on political argument describe “an aspect of civic virtue, not a limitation of civil (or other) rights”); Eisgruber, supra note 222, at 378-81 (arguing that laws enacted in response to religious arguments are not for that reason unconstitutional); Marshall, supra note 2, at 862-63 (conceding free speech rights but concluding that religion in the public square can be constrained by a “prevailing social norm” that religion is “off-limits” in politics); Perry, \textit{Politics}, supra note 226, at 197, 201 (conceding that religious arguments in public debate are protected speech, and that such views may influence the debate, provided that public moral disputes are resolved on grounds “articulable” in secular terms).

230. On the critical role of evangelicals in demanding an Establishment Clause, see CURRY, supra note 107, at 134-37, 141, 143-46, 148-51, 156-57, 163-77, 179-83, 185-89, 195, 198-99, 218-17; McConnell, \textit{Origins}, supra note 143, at 1436-43. For defenses of the equal right to make either religious or secular arguments in political debate, see Larry Alexander, \textit{Liberalism, Religion, and the Unity of Epistemology}, 30 SAN DIEGO L. REV. 763 (1993) (rejecting claims of epistemological distinction between faith and reason or religious and secular arguments); Edward McGlynn Gaffney, Jr., \textit{Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality}, 64 TULANE L. REV. 1143 (1990) (reviewing the role of religion in debates over slavery, civil rights, and immigration, and arguing that “[r]eligious bodies . . . surely enjoy at least the same rights as other persons and groups to participate fully in the political process”); Maimon Schwarzschild, \textit{Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?}, 30 SAN DIEGO L. REV. 903 (1993) (arguing that although it may have been rational to view Christianity as the prime threat to liberalism in eighteenth-century Europe, it is erroneous to view religion in this way today);
On most religious issues today, there is no majority. All the principal antagonists perceive themselves as minorities who have been mistreated on at least some issues. This is true in my experience even of the Catholics and liberal Protestants. The evangelicals, Jews, secular humanists, civil libertarians, and the so-called cults all appear to perceive themselves as threatened minorities, whose values may be overwhelmed and their liberty curtailed by a majority that ranges from indifferent to hostile. Few of these people genuinely fear that their worship will be forbidden, or that they will be forced to worship against their will. But many on both sides fear that pervasive regulation in pursuit of the other side's moral and political values will make their lives intolerable.\textsuperscript{231}

Each side in the culture wars tends to impute the moderates to the other side, exaggerating its own sense of being outnumbered and victimized. The nonbeliever sees polls that show a population overwhelmingly religious and almost as overwhelmingly Christian, and he feels badly threatened. In the largest-ever survey of religious affiliation, conducted in 1990 with a sample size of 113,000, 86.2\% of respondents described themselves as some variety of Christian, and 3.3\% claimed some other religion.\textsuperscript{232} Agnostics, humanists, and “no religion” totaled 8.2\%; the remaining 2.3\% refused to answer.\textsuperscript{233} When the question is phrased as whether the respondent believes in “God or a Universal Spirit,” the percentage of affirmative answers rises to the mid-nineties, and this result has been remarkably stable over decades.\textsuperscript{234} As surprising as it may be to academics, confessed nonbelievers are a single-digit minority.

\begin{footnotesize}
\begin{footnotes}

\item[232] Kosmin \& Lachman, supra note 212, at 15-17.

\item[233] Id.

\end{footnotes}
\end{footnotesize}
These numbers are real, but they also are misleading. Only about three-quarters believe in life after death, and only about two-thirds believe that God is "the all-powerful, all-knowing Creator of the universe who rules the world today." These are still lopsided majorities, but now we begin to see huge minorities: Nearly 30% of theists and 20% of self-declared Christians apparently have unorthodox views on fundamental points. Only 60-70% of the population report that they are members of a church or religious organization. Only about 40% report attending church or synagogue in any given week, and a recent study based on actually counting people at services suggests that the real number is only about 20%. That is, people appear to report going to church about twice as often as they actually go. The conservative Christian whose values regularly are rejected in public policy decisions sees much of the Christian majority as only nominally Christian—as effectively on the other side. In his view, most Christians have accommodated their religious belief to the secular values of the modern age. He too feels outnumbered and threatened.

The evangelical pollster George Barna strikingly illustrates this view. His polls confirm the standard result that 95% of American adults profess belief “in God or a universal force." But on the basis of answers to questions about specific religious beliefs, he concludes that only 67% “have an orthodox Judeo-

235. GREELEY, supra note 197, at 14 & Table 2.1.
236. BARNA, supra note 234, at 109.
237. Warner, supra note 197, at 1049 (citing Gallup poll data from 1990 (69%) and General Social Survey data from 1991 (61%); reporting peak of 73% in 1960s); see also KOSMIN & LACHMAN, supra note 212, at 6, 9 (citing church surveys from 1890 to 1936, and Gallup poll data after World War II, with estimates of church membership ranging from 45% in 1890 to 62% in 1990s).
238. See GREELEY, supra note 197, at 43 (citing Gallup poll data from 1939 (41%) to 1984 (40%), with low of 37% in 1940 and high of 49% in 1955). Similarly consistent polling data from multiple sources extending into more recent years is collected in C. Kirk Haddaway et al., What the Polls Don’t Show: A Closer Look at U.S. Church Attendance, 58 AM. SOC. REV. 741, 741-42 (1993).
239. See Haddaway et al., supra note 238, at 742, 743-48 (estimating 19.6% attendance among Protestants in a typical Ohio county and 25% attendance among Catholics in 18 dioceses).
240. See David Frum, Dead Wrong, NEW REPUBLIC, Sept. 12, 1994, at 17 (arguing that the Christian Right has little power to impose its policy preferences).
Christian view of God." He further concludes that 7% of the population is "evangelical," 28% is "born-again" but not evangelical, and 65% is "non-Christian." He explains that according to the Bible, those who are not born again are not Christian. Christians with a different theology reasonably may feel that his definitions have excluded them for heresy. I do not endorse his definitions, but I report them for what they show about perceptions: both the nonbeliever and the evangelical can see themselves as part of a single-digit minority.

Barna also says, based on his general impressions and not a specific survey question, that "most Americans merely dabble in spirituality. They use it as a quick fix during crisis points, as a sedative to assuage their guilt or as a means to a worldly end."

Because each group perceives itself as a mistreated minority, each appeals to the American tradition of protecting minority rights from the majority. The duality of the Religion Clauses makes it easier to structure the debate in this way. The religious groups generally appeal to the Free Exercise Clause, and their opponents to the Establishment Clause. The perception has become widespread that the Free Exercise Clause is pro-religion and the Establishment Clause is anti-religion. On this view, the two clauses are in serious conflict. Each side tends to believe that its own preferred clause should be broadly construed and vigorously enforced, and that it should prevail in any conflict with the other clause. The distilled essence of this

---

242. Id. at 107. The criterion was the question quoted in text at note 236 supra, whether God is "the all-powerful, all-knowing Creator of the universe who rules the world today."

243. Id. Barna counted as Christians those who claimed "a personal commitment to Christ that is still important in their lives today," and who believe they "will go to heaven because they have confessed their sins and accepted Jesus Christ as their Savior." Id. at 18. Gallup poll data report that about 70% of the population believes that "there is a heaven where people who have led good lives are eternally rewarded." GREELEY, supra note 197, at 14 (citing data from 1952, 1965, and 1980). Barna, following Calvin (and also Luther), rejects this reliance on works rather than faith. BARN, supra note 234, at 17-18. Barna defined evangelicals as Christians who say "religion is important in their lives," agree with his "orthodox Judeo-Christian concept of God," reject the view that one can get to heaven by doing good works, believe "that the Bible is accurate in all that it teaches," believe that Satan "is a living force" and not a mere "symbol of evil," and acknowledge a personal responsibility "to tell other people their religious beliefs." Id. at 17-18.

244. BARN, supra note 234, at 18.

245. Id. at 108.
argument appears in Suzanna Sherry's article, *Paradox Redux*, which argues that the two clauses are inherently inconsistent and that the basic and perhaps only important choice is deciding which one to subordinate to the other.

This is a mistake at the most fundamental level, and not just because it imputes incoherence to the Founders. The Religion Clauses were no compromise of conflicting interests, but the unified demand of the most vigorous advocates of religious liberty.

More fundamentally, this interpretation inverts an essential purpose of the clauses: to enable people of fundamentally different religious views to live together in peace and equality, cooperating in the task of self-governance, with no one forced to suffer for their faith. Under the widespread interpretation that Professor Sherry has crystallized, the clauses can mean only that one side wins and the other side is subordinated. This interpretation abandons the goal of equality, it guarantees conflict over who will win and who will be subordinated, and it greatly increases the risk that those who are subordinated will suffer for their faith.

We think of the Reformation as principally a bipolar conflict between Protestants and Catholics, even though there were many internal conflicts on each side, and cross-cutting issues of comparable importance, such as the rise of nationalism, capitalism, and representative parliaments. We are much more aware of the subdivisions and cross-cutting issues in our own time, and it is harder to identify or precisely describe the most fundamental lines of division. But at least one of the fundamental divisions is religious, and the line of division is approximately between those who believe that God has laid down eternal and inflexible moral laws that govern both their public and private behavior, and those who do not—those who do not believe in God, or do not experience their God as so inflexible, or experience God as relevant only to their private life.

This division has replaced Protestant-Catholic and Christian-Jewish divisions as the fundamental source of religious conflict, and mediation of this conflict must therefore be a core purpose of the Religion Clauses. The question for the Religion


247. Id. at 124.
Clause in our time is not whether progressives and modernists should triumph over orthodox and traditionalists (or vice versa), but how all these groups can live together in peace and equality, cooperating in the task of self-governance, with no one forced to suffer for their faith or lack of one.

III. COMPARING THE TWO ERAS

A. THE SOURCE OF PERSECUTION

What was the central evil of the Reformation-era religious conflicts? Correspondingly, what is the central evil against which the Religion Clauses were aimed? There are two very different and widely held answers to these questions. Either:

1. Human beings suffered for their religious beliefs and practices; or

2. Religions imposed suffering on human beings.

On the first account, the fundamental purpose of the Religion Clauses is to protect the religious choices of human beings. Or as Michael McConnell has put it, "[t]he great evil against which the Religion Clauses are directed is government-induced homogeneity" in religion. On the second account, the fundamental purpose is to prevent religion from ever causing such trouble again. On the first account, the principal threat to religious liberty is the State; on the second account, the principal threat is religions.

There is some truth in both accounts; religions were both persecutors and persecutees in the Reformation era. But there is far more truth in the first account; it was the State that had the power to persecute. Religious pronouncements had no effect without the temporal power of the State. Interdicts and excommunication had no effect on those who had already repudiated the interdicting or excommunicating authority.

Even under the various Inquisitions, where the Church may have been most culpable, power to inflict temporal punishment was reserved to the State. This reservation of State power was often a bare formality, but it left ultimate authority in the

249. See 3 Henry Charles Lea, A HISTORY OF THE INQUISITION OF SPAIN 183-90 (1907) (reviewing the practice of abandoning convicted heretics to "the secular arm," and noting that execution generally followed without any independent judgment by the State).
State, so that the Inquisition "was effective where the secular ruler proved cooperative." The form and vigor of the Inquisitions varied sharply over time and place, often in response to local law and politics. Sometimes the State took the lead and the restraining influence came from the Church. For example, it was Ferdinand and Isabella, and not a pope, bishop, or religious order, who invigorated the Spanish Inquisition and appointed Tomas de Torquemada, the most infamous of the Inquisitors General. The Spanish Inquisition was always subject to the Crown, and only secondarily to the Pope; the Kings of Spain always appointed the Inquisitors General and had effective power to secure their resignation.

250. SPITZ, supra note 3, at 302 (speaking of the Roman Inquisition during the Counter-Reformation); see also 1 LEA, supra note 249, at 289 ("Throughout Christendom the relations between Church and State were too often antagonistic for [the Inquisition's] commands always to receive obedience."). For examples, see WILL DURANT, THE RENAISSANCE 527-28 (1952) (reporting that the Signory of Brescia refused to execute witches condemned by the Inquisition, despite papal excommunication of secular officials who refused to carry out the religious judgments without further inquiry); PETERS, supra note 14, at 110 (reporting that Italian city-states successfully insisted that local representatives sit with the Roman Inquisition and that secular authorities review severe sentences).

251. See PETERS, supra note 14, at 71-74 (comparing operation of Inquisitions in different countries in the late middle ages and early modern period).

252. On Ferdinand's personal role, and on the relation of the Inquisition to the Spanish Crown, see 1 LEA, supra note 249, at 157-58, 172-77, 230-33, 289-98, 322-25; PETERS, supra note 14, at 85. The Spanish Inquisition "happened thanks to its architect and builder, who was, without question, Kind Ferdinand of Aragon." BENZION NETANYAHU, THE ORIGINS OF THE INQUISITION IN FIFTEENTH CENTURY SPAIN 1005 (1995). For an account of Torquemada, see ROLAND H. BAINTON, THE TRAVAIL OF RELIGIOUS LIBERTY 33-53 (1951). The Spanish Inquisition was unique, although not in ways that make it any less horrifying. Its primary target was the conversos, Jews who had converted (or whose ancestors had converted) to Christianity, most of them to escape murderous mobs in 1391, oppressive legislation of 1412, or expulsion from the country in 1492. HENRY KAMEN, INQUISITION AND SOCIETY IN SPAIN IN THE SIXTEENTH AND SEVENTEENTH CENTURIES 7-13, 18 (1985). Many conversos held prominent positions in government, finance, and even the church hierarchy; many were married into noble families. Id. at 18-19, 42. Their Christianity was always suspect; forced conversions did not spare them from anti-Semitism. The Spanish Inquisition lasted 300 years, but three-quarters of its victims were executed in the first 20 years, and well over 90% of the victims in that early period were conversos. Id. at 41-42. A major new history argues that most of the conversos were genuinely Christian, and that the underlying causes of the campaign against them were economic, racist, and nationalist, and not religious. NETANYAHU, supra. For a summary of this very lengthy argument, see id. at 1041-47.

253. 3 LEA, supra note 249, at 302-05.
ally, studies of court records have revealed that the religious judges of the Inquisitions were more lenient on average, and responsible for many fewer executions, than secular judges conducting heresy trials in other countries at the same time.\textsuperscript{254}

Steven Carter argues that the purpose of the Religion Clauses was to protect religion from the State.\textsuperscript{255} That is close, but not quite right; the purpose was to protect religious choice from the State, and religious choice includes the choice of disbelief. Robert Alley says that Carter has it backward, that the purpose was to protect the State from religion.\textsuperscript{256} And, Alley says, “church and religion must first corrupt government before that state, in turn oppresses.”\textsuperscript{257} As an historical claim this is simply not true, and it is most clearly not true in the case of England, the most relevant precedent. Henry’s motives were entirely secular. No Church took over his government; he took over the Church. To get his way, he had to execute the leading bishop and intimidate the rest.

The second view has been stated with more sophistication by Kathleen Sullivan, who repeatedly says the purpose of the Religion Clauses was to end “the war of all sects against all.”\textsuperscript{258} In her view, the State has imposed a truce on the warring religious sects.

The war of all against all does not accurately describe the Reformation-era conflicts. In almost every case, a better description would be that it was a war of one against all—of the State and its chosen religion against all the others. And the State was an active participant with independent motivations of its own. Even the four-cornered English conflict mostly fit the pattern of one-against-all. It was the Anglican Royalists against

\textsuperscript{254} See Peters, supra note 14, at 87; see also id. at 111-12 (noting that secular tribunals in Italy complained that Roman Inquisition was too lenient on witchcraft).

\textsuperscript{255} Carter, supra note 199, at 115-16.


\textsuperscript{257} Id. Despite the breadth of this statement, it is possible that in context, he is asserting that this would be true only of democratic governments. This more limited claim is belied by Employment Div. v. Smith, 494 U.S. 872 (1990) and all other cases of democratic regulation of religion for secular reasons. Alley apparently agrees that Smith oppresses religion; he calls the decision “infamous.” Id. With respect to both democratic and nondemocratic governments, Alley has not thought through the implications of secular motivations for restricting religious liberty.

\textsuperscript{258} Sullivan, supra note 228, at 197.
everyone else until the Puritans took over the State; then the
Puritans turned on the Scots Presbyterians and the Irish
Catholics. Shifting fortunes dictated temporary alliances; for
example, Catholics supported the Royalists during the Civil War
because they feared the Puritans and Presbyterians more.259
The Catholic James II tried to save his throne by offering
concessions to the dissenting Protestants, but this was one-
against-all again: a desperate attempt to create an alliance of
religious minorities against the Anglican majority and an
Anglican Parliament more powerful than the King.260 For
most of the long period of religious conflict, one faith at a time
controlled the government, and the government determined
policy toward the other faiths.

The pattern of one-against-all continued in this country:
Baptists, Quakers, Presbyterians, Mennonites, and Methodists
united in their opposition to the Congregational establishment
in New England and to the Episcopal establishment in the
South. It was these evangelical sects that successfully de-
manded both the Free Exercise Clause and the Establishment
Clause.261

One-against-all broke down when no one religion was strong
enough to dominate. Among the first religious minorities to gain
toleration were those too large to be suppressed: recall that
Luther was safe in Wittenberg because the Emperor was afraid
to arrest him there.262 The Anglicans promised toleration to
the Protestant dissenters because they feared a Catholic-
dissenter alliance.263 When the dominant religion made con-
cessions out of weakness, this was the first step on the road to
religious pluralism. When there are so many religions that no
one of them can hope to dominate, religious liberty is largely
safe from other religions. This was Madison's insight in
Federalist 51.264 The multiplicity of religious factions compet-

259. DAVIES, supra note 87, at 210-11.
260. See PRALL, supra note 131, at 143-46 (explaining why a Catholic-
dissenter alliance could not succeed against an Anglican majority).
261. See sources cited supra note 230.
262. See supra note 19 and accompanying text.
263. See supra text accompanying note 134.
264. THE FEDERALIST No. 51, at 324 (Clinton Rossiter ed., 1961) ("In a free
government the security for civil rights must be the same as that for religious
rights. It consists in the one case in the multiplicity of interests, and in the
other in the multiplicity of sects. The degree of security in both cases will
depend on the number of interests and sects.").
ing in the marketplace of ideas—what Sullivan condemns as the war of all sects against all—is in fact an important structural protection for religious liberty.\textsuperscript{265}

The protection provided by religious pluralism is not foolproof, even as against other religions. A coalition of similar religions can unite to oppress a dissimilar religion, or a coalition of religious and secular interest groups can unite to suppress a religion they dislike for quite independent reasons.\textsuperscript{266} Moreover, experience and public choice theory have revealed what Madison failed to recognize: a well-organized political minority can do the same things if its victims are smaller in number, not well-organized, or lacking political influence for some other reason.

Although religions work to suppress other religions in these scenarios, they do so through the ordinary political process and through the coercive power of the State. The mechanisms by which a religious minority might be suppressed in a religiously pluralist state are identical whether the political faction demanding suppression is a coalition of other religions, or a secular interest group demanding activist regulation without exceptions for religious dissenters. And in our time, one religion attempting to suppress another is a rare event compared to the far more common case of a secular interest group attempting to suppress a religious practice.\textsuperscript{268}

\begin{itemize}
\item \textsuperscript{265} Sociologists of religion seem to be discovering the marketplace model of religious competition that legal doctrine on religious liberty has long taken for granted. See Warner, supra note 197, at 1045 (offering a “new paradigm,” based on “the idea that religious institutions in the United States operate within an open market”). Sociologists and social historians are now offering evidence to support the lawyers’ claim that disestablishment explains much of the greater vitality of religion in this country as compared to Europe. See Greeley, supra note 197, at 126–27 (reporting survey data showing no difference in religiosity between United States and Great Britain among Catholics and non-Anglican Protestants; “lower levels of religiousness in Great Britain are purely an Anglican phenomenon”); Warner, supra note 197, at 1048-58.

\item \textsuperscript{266} See Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1, 67 (describing “the anti-Santeria coalition—animal rights activists, Christian fundamentalists, and people who just seem to find animal sacrifice disgusting”).

\item \textsuperscript{267} See The Federalist, supra note 264, No. 10, at 80 (“If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.”).

\item \textsuperscript{268} See Laycock, supra note 266, at 57-58 (analyzing why secular interest groups resist religious exemptions, illustrating with examples of landmarking and gay rights lobbies).
\end{itemize}
It is emphatically not my claim that the churches have been innocent, either in the Reformation era or today. But I do emphasize two points about the State: 1) in general, it was only the State that had the power to persecute, and 2) either the State or the Church could provide the motive to persecute.

Persecutions depend on the coercive power of the State. Churches could persecute only when the religious authority of the Church was combined with the governing authority of the State, or when the Church usurped the State's monopoly of legitimate violence. Occasional private persecutions, as in civil wars, pogroms, and deprogramming, usually depend on the instigation or at least the acquiescence of State; they always depend on usurping the monopoly of legitimate violence.

Either Church or State could provide the motive for persecution. The Church could urge or request the State to persecute, or the State could persecute for its own reasons. The evil was the same in either case: Human beings suffered for their religious belief and practice.

The central meaning of separation of Church and State is to separate these two sources of authority, depriving religion of the State's power to coerce, and depriving the State of power over religion. That separation accomplished, the State still has its monopoly of legitimate violence. It has the power to regulate and punish, to seize the property of individuals and groups, to imprison them or execute them. The State, as always, remains a direct threat to liberty.

The Church has only the power to persuade. Its members have the power to compete for votes with all other citizens. And while I would fear a government dominated by activists from the Christian Coalition, I would equally fear a government dominated by activists from the Environmental Defense Fund, the National Organization of Women, the National Taxpayers League, the Humane Society, the National Historic Trust, the American Civil Liberties Union, or any other group with a strong commitment to one or a few issues. The twentieth century has produced Hitler, Stalin, Mao, and Pol Pot, and in our own country terrorist bombs on behalf of peace, environmentalism, the right to bear arms, and the liberation of Puerto Rico. It is not that "religion" is "inherently intolerant and persecutory"; rather, the risk of intolerance and persecution is a risk of any human movement organized for a common purpose. I see no reason to believe that religion presents a risk different in kind
or degree from the risk of secular ideologies.\textsuperscript{269}

B. \textbf{REDUCTIONS IN FORCE AND IN THE STAKES OF COMPETITION}

Two obvious differences between Reformation-era conflicts and our own are the levels of force and the stakes of the conflict. Kathleen Sullivan's notion of the war of all against all provides a useful point of departure. Criticizing Michael McConnell's view that the evil is government-imposed religious homogeneity, she says, "In other words, the war of all sects against all is to continue by other means after the truce."\textsuperscript{270}

I do not know exactly what Sullivan means by this, although she cannot mean the apparent implication that McConnell's view brings little improvement over the previous situation. Even if she were right that the war of all against all continues "by other means," the change in means would be one of the great advances of human history. Instead of guns, burning stakes, and chopping blocks, we use political organization, voting, litigation, free debate, and attempts to structure rules of debate to exclude the other side. This change is not complete; we also still use criminal punishment and the threat of criminal punishment against religiously motivated behavior.\textsuperscript{271} But we have made great progress toward channeling the conflict into legal, political, and social means, and away from violent means.

Equally important is a change that Sullivan does not acknowledge, a reduction in the stakes of competition. The war of all sects continues in the sense that sects may compete for adherents and for their views of proper government policy. But they may not compete to impose theology or forms of worship. They may not admit to the goal of suppressing other faiths, and in fact they rarely attempt it. The competition among sects is no longer total war; it is no longer for the right to exist and practice one's faith. These basic rights are largely conceded to all, and serious believers have a much greater interest in uniting against

\begin{itemize}
\item \textsuperscript{269} See Schwarzschild, \textit{supra} note 230, at 910-15 ("Religion seems an odd choice as prime threat to liberalism at the end of a century that has been so greatly dominated by struggles over Communism, fascism, and extreme nationalism.").
\item \textsuperscript{270} Sullivan, \textit{supra} note 228, at 198.
\end{itemize}
the secularism that threatens them all.

The circle of toleration has expanded many fold since the Reformation, and indeed, since the American founding. Catholics, Jews, Mormons, Protestants of all types, humanists, atheists, and agnostics are all within the circle. Hostility and suspicion continues in some quarters, but tolerance is proclaimed all around and the goal of suppression is repudiated.

The circle of toleration does not yet include the entire population. Some groups are subjected to mistreatment that readily fits the popular image of the Reformation-era—attempted suppression because of overt religious hostility. A clear example is deprogramming of so-called cult members: kidnapping and physical coercion to force the victim to recant unacceptable religious beliefs and practices.272 Another example is the ruinous jury verdicts against some of these unfamiliar religions, mostly for torts committed by religious communications.273 Another example was the Hialeah City Council meeting to consider the Church of the Lukumi Babalu Aye's attempt to open a church at which it would practice animal sacrifice. Among the reasons offered for prohibiting the church was that animal sacrifice was sinful, "an abomination to the Lord," and the worship of demons.274 But these examples of overt hostility to minority religions as such are far removed from the principal lines of conflict today.

C. THE CHANGING MOTIVES AND EXPANDED ROLE OF GOVERNMENT

Today's religious conflicts are much more likely to be secular versus religious instead of religious versus religious. The typical oppressive measure directed at a religious group results from the demands of some secular interest group and from the vastly


273. See, e.g., Wollersheim v. Church of Scientology, 6 Cal. Rptr. 2d 532 (Cal. App. 1992) ($30 million verdict, of which $2.5 million affirmed; in this case, the judgment was not based just on religious communications) (unpublished opinion); George v. International Soc'y for Krishna Consciousness, 4 Cal. Rptr. 2d 473 (Cal. App. 1992) ($32.6 million verdict, of which $1.5 million affirmed and punitive damage claims remanded for retrial) (unpublished opinion).

expanded role of government. As government regulation and government benefits become more pervasive, and as religion becomes ever more pluralistic, government and religion interact more often and in more complex ways.

Government burdens on religious exercise arise as incidents of secular regulation or from eligibility requirements of benefit programs, and rarely from one religion trying to suppress another. Illustrative issues include whether the State must pay unemployment compensation to a conscientious objector who quit his job in a defense plant, whether historical landmark laws can control the architecture of churches, or whether Catholic teaching hospitals must perform and teach the techniques of abortion. Establishment Clause controversies arise from private religious exercise in public places, or from religious participation in the distribution of government social services, and only occasionally from direct government attempts to support religion. Today's controversies are more complex and harder to decide, and it is harder to treat the range of disputes with theoretical consistency.

In addition, all sides are more prone to assert their alleged

---


276. See Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996) (reinstating one count of complaint alleging that historic zoning made it impossible to expand church and thus forced church to turn worshipers away from mass); Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) (upholding New York's refusal to allow a church to demolish and replace a landmarked building), cert. denied, 499 U.S. 905 (1991).

277. St. Agnes Hosp. v. Riddick, 748 F. Supp. 319, 320-32 (D. Md. 1990) (holding that the state may require a Catholic hospital to teach abortion techniques if it has residents in obstetrics and gynecology).

278. See, e.g., Capitol Square Rev. & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) (holding that a state that permits unattended displays in public forum must permit unattended religious displays); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a state university that makes its facilities generally available to student groups may not deny use of those facilities to a student group desiring to use them for religious purposes).

279. See, e.g., Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510 (1995) (holding that state university that funds wide range of student publications from student activity fees cannot deny funding because a publication is religious); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (holding that the Establishment Clause is not violated by a public school district paying the salary of a sign language interpreter in a parochial school); Everson v. Board of Educ., 330 U.S. 1 (1947) (holding that the state could reimburse parents for the cost of transporting their children to parochial school).
rights than in the past. The culture wars make interest groups and regulators less receptive to pleas of religious liberty, less willing to exempt religious minorities from regulation even when the cost to the regulatory scheme is mostly symbolic. Many secularists see little reason to accommodate an incomprehensible superstition that has lingered beyond its time, and many modernist believers see no reason why anyone's religious belief should affect the pursuit of public policy. Secular movements on both left and right exhibit the same tendency to excess and absolutism that we see in some religious movements.

The Supreme Court seems confident that it can distinguish deliberate suppression of religious exercise from general laws that suppress religious exercise only incidentally. In the Court's view, only deliberate suppression raises a constitutional question.

Suzanna Sherry has defended that distinction in originalist terms that are directly relevant to my review of the Reformation:

[T]he founding generation had no idea that government might be so involved in the lives of the people as to prohibit ordinary, everyday practices that affect religion. Advocates of the religion clauses feared deliberate persecution, not unforeseen general government growth with a negative impact on religion.

The originalist question, as Justice Brennan once said, should be whether a practice threatens those "consequences which the Framers deeply feared." The evil of the Reformation-era conflict was that the State with its coercive power made human beings suffer for their religious belief and practice; that was the consequence the Founders feared. The evil is the

---


281. Compare Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that regulation that targets religion or discriminates against religion must be justified by compelling interest) with Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that neutral and generally applicable laws may be applied to suppress core religious practices, and that such application requires no justification).

282. Sherry, supra note 246, at 148. I will not repeat here all the reasons for thinking that the Court was wrong. See generally Laycock, supra note 266; Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109 (1990).

same, whatever the State's motive. Employment Division v. Smith\textsuperscript{284} threatens that consequence; the Religious Freedom Restoration Act\textsuperscript{285} attempts to avoid it. My disagreement with Professor Sherry illustrates the familiar problem of the level of generality at which to state a principle. When the evil is human suffering, the sufferer is penalized because of his religious practice, and the State inflicts the suffering, focusing on the State's motive seems to miss the point.

In addition, more than one inference can be drawn from Professor Sherry's historical assumption. She is largely right that the Founders "had no idea that government might be so involved in the lives of the people as to prohibit ordinary, everyday practices that affect religion." The Founders encountered this problem, and granted legislative exemptions, but the issue arose only occasionally.\textsuperscript{286} The Founders knew about governments that would prevent a disfavored faith from building a church at all; they presumably could not imagine a government that would prevent a mainstream church from adding needed worship space because architecture buffs liked the old building.\textsuperscript{287} But I doubt they would have thought one of these governments less tyrannical than the other, or that they would have thought that only one of these governments had prohibited the free exercise of religion.

Professor Sherry reasons that the Founders would not have thought to forbid something they could not anticipate—suppression of religious practice by an activist government acting for secular reasons. But it is equally clear that the Founders did not think to authorize this thing they could not anticipate. The question is whether a novel threat to religious liberty falls within the principle of the Religion Clauses; the Founders' failure to anticipate the novel threat does not answer that question. To assume that it does is an error analogous to excluding Mormons and Jehovah's Witnesses from the Free Exercise Clause, television from the Free Press Clause, and wire taps from the Search and Seizure Clause.

\textsuperscript{284} 494 U.S. 872 (1990).
\textsuperscript{286} See McConnell, Origins, supra note 143, at 1466-73.
\textsuperscript{287} These are the facts of Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996) (upholding the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to § 2000bb-4 (1994). I should disclose that I represented Archbishop Flores on appeal.
Finally, recall that the Reformation-era governments often acted for their own secular reasons, even in religious matters. That is, part of the evil known to the Founders was religious persecution for secular motives, which is not so different from today's "neutral and generally applicable laws"—enacted for secular reasons but with the effect of suppressing a religious practice. 288

One of the most famous Reformation examples might itself be described as a neutral and generally applicable law if adjudicated today under the Free Exercise Clause. In Henry's England, it was treason to question the validity of his second marriage. 289 This prohibition was based on the strongest reason of national security. If his second marriage were invalid, the children of that marriage would be illegitimate; the claim of illegitimacy would challenge their right to the throne and threaten civil war over the succession. This particular form of treason was committed by stating a core Catholic belief, but the law applied to everyone and was stated in religiously neutral terms. Perhaps the example goes away because if it were litigated today, the law would be struck down under the Free Speech Clause or the Treason Clause. 290 Even so, I think the example further undermines the claim that neutral and generally applicable laws were no part of the problem the Founders sought to solve.

Disagreement over the validity of Henry's marriage turned on an underlying religious disagreement, but the underlying religious basis for the law would probably not keep it from being neutral and generally applicable under current doctrine. Employment Division v. Smith 291 relied on Braunfeld v. Brown, 292 which upheld the conviction of an Orthodox Jewish merchant for selling retail goods on Sunday. Plainly an underlying religious disagreement over the proper designation of the Sabbath was at the heart of this prosecution. But the

290. U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").
Court separated the rather modest secular functions of the Sunday closing law from its religious origins; the secular functions assertedly made it neutral and generally applicable. Similarly, a court could easily separate the underlying religious dispute from the critical secular function of Henry's marriage and of the law commanding respect for that marriage.

Another contemporary example of allegedly neutral laws with religious underpinnings is the landmarking of churches. In the wake of Smith, lower courts have held that landmarking laws are neutral and generally applicable, even though they apply only to certain properties and thus affected property owners do not get the protection that the political process provides against oppression by laws that burden everybody. One study found that churches are landmarked at a rate more than forty-two times higher than any other kind of property. Why? Because the landmark lobby appears to like sacred architecture. As Emily Hartigan has said in conversation, they want "the faint after-aroma of religion," but not the real thing. I do not believe that landmark laws are neutral and generally applicable, but if the courts say they are, Henry's treason law would be so a fortiori.

A religious disagreement underlies all neutral and generally applicable laws that burden religion, at least in the sense that the State rejects the minority's religious belief. Just as Henry rejected the Catholic belief that only the Pope could annul his marriage to Catherine, so Oregon rejected the belief that one can directly experience the presence of God through peyote intoxication, and Wisconsin rejected the belief that a simple life without a high school education better conforms to God's will. The law would have been different if a sufficient block of voters had been peyote worshipers or Old Order Amish, just as the treason law would have been different if Henry had remained Catholic. The fundamental split between secular and religious worldviews informs all disputes about exempting religious minorities from regulation.

---

I do not mean to impute any of these thoughts to the Founders except the most basic one: They did not want people to suffer for their religious beliefs and practices. The suggestions in this section are not offered as original intent in the sense that the Founders consciously thought about these things. Rather, they are offered as part of the related practice of interpreting a provision in light of the evil it was intended to remedy. The religious conflict in the wake of the Reformation was the most salient example of the evil to be avoided, and a major part of that example was government dominating religion, persecuting religious dissenters, and interfering in religious matters for reasons of state.

CONCLUSION

My view of the central lesson to be drawn from the Reformation should not be a surprise; it is consistent with our basic constitutional theory. The Constitution was written on the assumption that the concentration of powers necessary to an effective government is a threat to human liberty, and that those powers must be divided and constrained. The Bill of Rights protects the people from the government, not the other way around. The state-action distinction is drawn with special sharpness in the Religion Clauses: Religious belief and practice by private persons is specially protected; the same religious belief or practice by government is specifically prohibited. The puzzle is why the opposite assumption—that the Religion Clauses protect the government from religious citizens—has become so widespread.

In part it is because those who hold that view have misread history. They have blamed too much on the Church and too little on the State. In part it is because they have thought that their preferred secular ideologies were inherently different from religion, and that religion is uniquely susceptible to the temptation to intolerance and absolutism. I think that they are wrong on each of these points.

The First Amendment constrains Congress, not churches, and this is no accident. The amendment was aimed squarely at the problem the Founders sought to solve. During the Reformation and today, it was and is governments that punish people for religious beliefs and practices. The most common motives have changed, the alignment of factions has changed, but the central evil has remained the same.