
DIE AND LET LIVE? THE ASYMMETRY OF ACCOMMODATION

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The increasingly apt term “culture wars” refers to a polarizing tendency in which Americans are coming to coalesce around opposing political agendas that themselves murkily reflect divergent conceptions and evaluations of individualism, community, equality, authority, tradition, sexuality, Christianity, and the meaning and mission (if any) of America.¹ At the moment, the controversy over same-sex marriage is the most fiercely contested political and cultural battle, but the intensity of that particular battle is likely due in part to the fact that same-sex marriage is only one salient issue within a larger struggle.

Indeed, even the current debate over same-sex marriage immediately and explicitly implicates more than the issue of how marriage will be defined. Thus, religious conservatives typically oppose same-sex marriage

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1. See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991). Writing in the 1990s, Hunter described the competing positions with the terms “orthodox” and “progressive.” The “orthodox” camp, reflecting a “biblical theism” that includes many Catholics, Protestants, and Jews, is defined by “the commitment on the part of adherents to an external, definable, and transcendent authority.” *Id.* at 44, 71 (emphasis omitted). This authority “tells us what is good, what is true, how we should live, and *who we are.*” *Id.* at 44 (emphasis added). By contrast, the progressive camp is composed both of “secularists” who adhere to no religion and also of persons who, though counting themselves religious, place their trust in “personal experience or scientific rationality” over “the traditional sources of moral authority, whether scripture, papal pronouncements, or Jewish law.” *Id.* at 44–45. The conflict between these contrasting perspectives, Hunter thought, “amounts to a fairly comprehensive and momentous struggle to define *the meaning of America*—of how and on what terms will Americans live together, of what comprises the good society.” *Id.* at 51 (emphasis added). For an update and debate, see JAMES DAVISON HUNTER & ALAN WOLFE, *IS THERE A CULTURE WAR?* (2006); *Political Polarization in the American Public*, PEW RES. CENTER (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public>.

on the merits, but in addition, they worry about the effects of legal recognition of same-sex marriage on religious freedom.² On the other side, proponents of what they like to call “marriage equality”³ sometimes dismiss this concern as unwarranted; in the alternative, they may acknowledge the conflict and explicitly argue that equality (as they understand it) should take priority over the traditional commitment to freedom of religion.⁴ In between these parties is a group that I will call the moderators; among legal scholars this group includes people like Tom Berg,⁵ Alan Brownstein,⁶ Douglas Laycock,⁷ and Robin Wilson.⁸ The moderators, while supportive of same-sex marriage, regard the danger to religion and religious exercise as serious, but they think it should be possible to satisfactorily accommodate both sides. They typically present their own favored position “as a live and let live approach.”⁹

2. See SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) [hereinafter SAME-SEX MARRIAGE] (exploring the religious freedom conflicts that might emerge, and how these potential conflicts might be resolved, if the legal definition of marriage were expanded to include same-sex couples).

3. The term is not only rhetorically powerful—who, after all, wants to come out against either “marriage” or “equality”?—but also tendentious and question-begging. See Steven D. Smith, *The Red Herring of “Marriage Equality,”* PUB. DISCOURSE (March 27, 2013), <http://www.thepublicdiscourse.com/2013/03/7912> (discussing the use of the phrase “marriage equality” in political and legal discourse).

4. See, e.g., Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069, 2072 (2011) (arguing that groups engaged in “odious discrimination”—discrimination based on personal identity or other immutable characteristics—should not be allowed to claim religious exemptions to anti-discrimination laws); Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE, *supra* note 2, at 123, 156 (arguing that society should not prioritize religiously based moral beliefs over other sincerely held core moral beliefs).

5. See Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279 (2013) [hereinafter Berg, *Progressive Arguments*]; Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 206 (2010) [hereinafter Berg, *Same-Sex-Marriage*]; Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. IN BRIEF 1 (April 2013).

6. See Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389 (2011).

7. See Laycock & Berg, *supra* note 5; Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 [hereinafter Laycock, *Culture Wars*]; Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407 (2011) [hereinafter Laycock, *Free Exercise*].

8. See, e.g., Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012).

9. Brownstein, *supra* note 6, at 390, 416. See also Berg, *Same-Sex-Marriage*, *supra* note 5, at 208, 226, 228; Laycock, *Culture Wars*, *supra* note 7, at 852, 878; Laycock, *Free Exercise*, *supra* note 7, at 429.

Thus, in a series of important articles,¹⁰ Laycock argues that support for religious freedom and for same-sex marriage (and sexual equality generally) have much in common—in each case, he thinks, the goal is to respect individual identity and autonomy and to protect minorities who have historically been oppressed¹¹—but that even if conservative Christians cannot make common cause with secular egalitarians, or vice versa, the parties ought to be able to embrace a mutually acceptable *modus vivendi*. More specifically, the law should recognize same-sex marriage while providing generous exemptions so that religious believers and institutions who oppose the practice are not required to recognize or facilitate such marriages.

This compromise would largely or fully accommodate the legitimate interests of each side, Laycock suggests, so the only reason why the compromise is not realized is that the contending parties are intransigent. “Each side,” he says, “wants a total win.”¹² Thus, proponents of sexual equality insist on enforcing antidiscrimination laws against religiously scrupulous counselors, photographers, pharmacists and others, even though these professionals’ services or products are readily available elsewhere, and even when no sensible same-sex couple would actually want the assistance of, say, a counselor or photographer who is religiously opposed to their union. In such litigation, Laycock observes, the goal is not to gain a needed remedy but rather to punish opponents, and to drive them out of business.¹³ Conversely, conservative Christians oppose measures such as same-sex marriage even when these measures would leave the religious believers themselves free to marry according to their own beliefs and commitments. “The religious side,” Laycock asserts, “persists in trying to regulate other people’s sex lives and relationships so long as it thinks it has any chance of success.”¹⁴

The force of Laycock’s and other moderators’ diagnosis and critique, and the rhetorical power of their attempt to claim the reasonable “middle

10. Laycock & Berg, *supra* note 5; Laycock, *Culture Wars*, *supra* note 7; Laycock, *Free Exercise*, *supra* note 7.

11. See Laycock & Berg, *supra* note 5, at 3–5 (“Religious liberty . . . can protect the rights of religious organizations and religious believers to live their own lives in accordance with their faith. But it cannot give them any right or power to deprive others of the corresponding right to live their lives according to their own deepest values.”)

12. Laycock, *Culture Wars*, *supra* note 7, at 879.

13. See, e.g., Laycock & Berg, *supra* note 5, at 8 (“Of course, no same-sex couple would ever want to be counseled by such a counselor. Demanding a commitment to counsel same-sex couples does not obtain counseling for those couples, but it does threaten to drive from the helping professions all those who adhere to other religious understandings of marriage.”)

14. Laycock, *Culture Wars*, *supra* note 7, at 879.

ground,” derive in important part from an implicit claim of symmetry. This claim informs both the prescriptive and the critical aspects of the moderators’ arguments. There is a prescriptive appeal to symmetry in the effort to cast the moderators’ favored outcomes—such as the legalization of same-sex marriage together with accommodations for the religiously scrupulous—as balanced and equally respectful of each side’s legitimate interests. This is the claimed symmetry of “live and let live.” And there is a critical symmetry in the effort to cast people on each side who hesitate to embrace the proffered compromise¹⁵—mainly, the conservative Christians and the secular egalitarians¹⁶—as similarly and equally intransigent, equally insistent on “a total win,”¹⁷ equally eager to “oppress the other”¹⁸ or (as the saying goes) to “impose their values”¹⁹ on everybody.

Although I believe Laycock’s diagnosis of our situation contains a good deal of truth and insight, I also think its implicit claim to symmetry, both in its prescription and in its criticisms, is unwarranted. As a consequence, its overall diagnosis of our situation seems to me at the same time unfairly critical and unduly complacent. In this Essay I will try to explain this demurral.

First, though, an important caveat. In talking about the “culture wars” we tend to lump people on each side together and to treat the opposing “sides” to some extent as monoliths. Such simplifying descriptions are obviously artificial. Each “side” is composed of millions of people who differ in their exact goals and commitments. Some people are leaders and spokespersons while others are complacent and perhaps not very attentive followers. Some are more aggressive and extreme than others in their objectives and their rhetoric. And each side, like any large-scale social phenomenon, will have a few “crazies” (as Laycock aptly puts it²⁰)—think of the Westboro Baptists—who are an embarrassment to their own

15. The position is a “compromise” both for traditionalists who oppose same-sex marriage and for proponents of same-sex marriage who would prefer narrower or no exceptions or qualifications. It is not a compromise for the moderators themselves: they get pretty much everything they want, so to speak.

16. These are rough and underinclusive descriptions of the competing sides. Plainly, there are non-Christians on the more traditional side, and religious liberals or—as they often prefer—“progressives” on the “egalitarian” side. Hunter’s more deliberate sociological study defined the camps more inclusively. See HUNTER, *supra* note 1. Laycock’s articles focus mostly on Christian traditionalists and their secular opponents, however, and for the limited purposes of this Essay, that focus seems acceptable.

17. Laycock, *Culture Wars*, *supra* note 7, at 879.

18. Laycock & Berg, *supra* note 5, at 5.

19. STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 129 (2014).

20. Laycock, *Free Exercise*, *supra* note 7, at 418.

ascriptive allies and who have no realistic chance of dictating any larger agenda, but who nonetheless are capable of grabbing attention and causing mischief. These complications should not preclude us from talking about social movements, I think, or about “culture wars”; still, it is prudent to keep these qualifications in mind.

I. TO ACCOMMODATE, OR TO BE (MAYBE) ACCOMMODATED?
THAT IS THE QUESTION

Let us start with the issue of the day. Suppose a state—or *all* states—were to legalize same-sex marriage while also building ample religious exemptions into the law. Would that arrangement be symmetrical, in the sense of being equally respectful toward and accommodating of those who favor and those who religiously oppose same-sex marriage?

We might restate the question in the indignant or accusatory tone in which it is usually pressed. Many favor extending marriage, but no one proposes restricting it, to same-sex couples. Thus, laws and judicial decisions authorizing men to marry men and women to marry women still permit men to marry women (and vice versa). So anyone with a traditional view of marriage is still perfectly free to marry an opposite-sex spouse if she or he so chooses. And at least if religious exemptions are built into such a law, then churches and clergy would not be compelled to marry same-sex couples in contravention of a church’s religious beliefs—or to recognize such unions as “marriages” at all. So then, what legitimate interest of the religious traditionalist would be impaired? How can the traditionalists be viewed as anything other than busybodies attempting to “impose their values” on—or as Martha Nussbaum puts it, “lord it over”²¹—others with different views and values?

Before answering, we might turn the question around. In its decision legalizing same-sex marriage that led to the passage of Proposition 8, the California Supreme Court observed that California law already recognized a status of domestic partnership that was available to same-sex couples and that was virtually identical in its legal features to marriage.²² And of course it was always possible for such couples to regard themselves as married, to present themselves to others as married, and even to have their unions solemnized in a church that would declare the union to be a “marriage.” Why then was it so imperative for *the law* to offer such couples the

21. MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 28 (2008).

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

possibility of a legal status officially *labeled* “marriage”?

The answer, it seems, lies in part in what is sometimes called the expressive function of the law. Even—or perhaps *especially*, as the California Supreme Court suggested—if “domestic partnership” is identical in its legal features to “marriage,” the law’s calculated omission to extend the term “marriage” to such partnerships effectively sends a message that these unions are not of equal dignity with the opposite-sex unions that *are* described by the law as “marriages.” Even if the law didn’t explicitly *say* this, many discerned such a message.²³ It is surely understandable that same-sex couples might resent this symbolic denial of equivalence.

But then, of course, the reverse is also true: if the law applies the label of “marriage” without distinction to both opposite-sex and same-sex couples, the law sends the contrary message—namely, that such unions are of equivalent status, and that both are equally “marriages.” People or churches are free, of course, to believe for themselves that these unions are not really marriages, whatever the law may say—just as they were free before the court’s decision to believe for themselves that such unions *were* marriages. But after the state court’s decision, equivalency became the official position endorsed by the law in California, as it is in a growing number of other states. And that official message contradicts the religious beliefs of traditionalists: it is thus a message effectively implying that traditional religious beliefs on the subject are officially disfavored or rejected. Just as it is understandable that same-sex couples might resent an official message implying that their unions are not equivalent to opposite-sex marriages, it is understandable that religious citizens might resent a message indicating by clear implication that their religious beliefs on this subject are mistaken.²⁴

23. See, e.g., Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1275 (2011) (“[L]aws withholding the term marriage from same-sex couples unconstitutionally convey the message of second-class citizenship . . .”); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1382 (2010) (describing “the dignitary harms that flow from the creation of ‘separate but equal’ solutions such as extending equivalent material benefits to gay and lesbian couples under the rubric of civil unions”).

24. Michael Perry points out to me that a judicial decision striking down a traditional marriage law need not assert that traditional views are false; the decision might instead assert that the law is based on religious rationales that are not necessarily false but that are deemed inadmissible as a basis for secular law. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 898 (Iowa 2009) (“A specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes, however, when the tradition is nothing more than the historical classification currently expressed in the statute being challenged.”). I think Perry is right—although I also think this judicial rationale is misguided. Both in popular debate and in the United States Supreme Court, however, opponents of traditional marriage laws routinely equate support for such laws with hatred or “animus.” *E.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (noting that the legislative history of the Defense of

Even more importantly, adherents to both positions understand that governmental expressions on such matters are not *merely* expressive: such messages have practical and sometimes coercive consequences. For example, whatever may or may not be legally *mandated*, the ideas and commitments so expressed will likely come to be reflected in the public school curriculum.²⁵ Thus, traditionally Christian parents understand that in recognizing same-sex marriage, the state has not only sent a message implying that their own religious beliefs are to that extent wrong; they understand that if their children attend public schools, they will likely be the recipients of instruction tacitly or explicitly contradicting what the children are taught at home or at church, and indicating by clear implication if not explicitly that these religious teachings are backward and hurtful.

In addition, expressions of official governmental positions may be expected to affect public policies and judicial decisions. Antidiscrimination laws will likely have different implications and a different scope once the law's official position is to treat same-sex marriages as legal and equivalent to opposite-sex unions.²⁶ Conflicts between such antidiscrimination provisions and, say, rights to freedom of religion, association, or speech are often resolved through what is euphemistically called "balancing." And although there has never been any workable metric or methodology for performing such "balancing,"²⁷ official declarations of policy can affect

Marriage Act demonstrates that the law was motivated by improper animus). This argument may be criticized, to be sure. Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675 (2014). Even so, given this pervasive feature of the cultural debate, it seems virtually certain that rejection of traditional marriage laws in favor of the legalization of same-sex marriage will be perceived and mostly intended as indicating that the traditional laws are archaic and wrongheaded. And many Christians surely do perceive the legalization of same-sex marriage as a rejection of Christian values and views. See, e.g., Rod Dreher, *Sex After Christianity*, AM. CONSERVATIVE (Apr. 11, 2013), <http://www.theamericanconservative.com/articles/sex-after-christianity> (arguing that gay marriage "will make ours a far less Christian culture").

25. For diverging analyses of this concern, compare Allison Fetter-Harrott, *Recognition of Same-Sex Marriage and Public Schools: Implications, Challenges, and Opportunities*, 2011 BYU EDUC. & L.J. 237, with E. Vance Randall, *Same-Sex Marriage and Education: Implications for Schools, Students, and Parents*, 2011 BYU EDUC. & L.J. 385.

26. It is true, to be sure, that antidiscrimination laws can be interpreted aggressively against, say, photographers and others even in states that do not recognize same-sex marriage, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62–63 (N.M. 2013) (holding that a photography studio's refusal to photograph a same-sex commitment ceremony was discrimination based on sexual orientation in violation of New Mexico's antidiscrimination law), and that such laws might not be interpreted aggressively against religious institutions even if same-sex marriage is recognized. Even so, it would be naive to pretend that legalization of same-sex marriage will not over time have effects on the scope and application of antidiscrimination laws.

27. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (discussing the limitations of "balancing" as the prevalent method of constitutional

how much metaphorical “weight” courts assign to the competing interests.²⁸

While moderators make appeals for “live and let live” accommodation, therefore, the contending parties themselves understand that the struggle is over who will be doing the accommodating to whom. Proponents of same-sex marriage perceive, correctly, that domestic partnership is not likely to have *all* of the same legal features and advantages as marriages; and even if it does, in such an arrangement heterosexual marriage is the “normal” position and it is the same-sex couples who are being accommodated. By the same token, citizens with more traditional beliefs perceive that a law recognizing same-sex marriage, even if it comes with religious freedom “exceptions” or “exemptions,” reverses these positions: now *they* are the ones who are the outliers hoping to be accommodated.

But for both psychological and practical reasons, many people understandably prefer to be in the position of deciding whether and what to accommodate than to be in the position of hoping and pleading to *be accommodated*. They would rather be the *tolerators*, so to speak, than the *toleratees*. Beyond the sense of alienation or exclusion that may attend being an “accommodated” or “tolerated” outsider, there is the real danger that accommodation may be withheld or restricted—if not immediately, then after the dominant party has consolidated its position. These are legitimate concerns, and even if you think they are in some contexts exaggerated, it is a misdescription to depict each side as merely and gratuitously attempting to “oppress” or “impose its values” on others.

The discussion thus far partly supports but mostly contradicts the moderators’ implicit claims of prescriptive and critical symmetry. Thus, whatever its pragmatic merits, the moderators’ prescription—namely, for legal recognition of same-sex marriage together with exemptions for religious objectors—cannot accurately claim to be symmetrical in the sense that it is equally respectful of both of the contending positions and their legitimate interests. On the contrary, the prescription privileges the group supporting same-sex marriage by accepting their view as the official governmental position while casting religious objectors as the outsiders to be “accommodated” through the adoption of “exceptions” or “exemptions.”

interpretation).

28. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 593–95 (1983) (considering numerous Executive Orders that demonstrated a commitment to the policy of eliminating racial discrimination in reaching its holding).

The moderators' critical suggestion of a sort of equivalency-in-intransigence between proponents and opponents of same-sex marriage who decline to embrace the proffered compromise also seems misguided. In fact, neither side is being *merely* intransigent. Rather, both sides are acting on legitimate interests in resisting being placed in the demeaning and vulnerable position of (hopefully) accommodated or tolerated outsiders.

Admittedly, insofar as both sides are acting on legitimate interests and concerns, there *is* a sort of symmetry in their stances. This is a thin symmetry, however. To be sure, each side understandably fears that if it is placed in the position of needing accommodation, that accommodation may be withheld or withdrawn, if not immediately then in the future. But it does not follow that the risk of not being accommodated is equal for each side.

So we need to ask: on the supposition that it may find itself in a politically subordinate position, and thus in need of accommodation, for which side in the cultural struggle is the risk of being denied accommodation more serious? Which side—the religious conservatives or the secular proponents of sexual liberty and equality—has more to lose if the other side establishes itself as politically dominant?

II. THE COMPARATIVE RISKS OF NON-ACCOMMODATION: A SHORT-TERM RECKONING

We might begin by considering that question within a relatively short time frame—five or ten or twenty years, say. Imagine that within the near future, one side or the other is largely successful in realizing its currently articulated goals or agenda. Which side, if thus rendered subordinate, would find itself in a more untenable situation? Although my purpose here is to criticize Laycock's and the moderators' implicit claim of symmetry, as someone who stays relatively detached from politics, current events, and even lower court litigation, I emphatically do not want my criticism to rest on any pretension to superior knowledge of political trends and agendas. So I will take my assessment of the different sides' ambitions largely from Laycock's own discussions.

So, to begin with, what does the party of sexual freedom and secular equality have to fear from the conservative Christians? I have already quoted Laycock's assertion that "[t]he religious side persists in trying to regulate other people's sex lives so long as it thinks it has any chance of success."²⁹ That sounds ominous. But here I think Laycock settles for a

29. Laycock, *Culture Wars*, *supra* note 7, at 879. See also Laycock, *Free Exercise*, *supra* note 7, at 418 ("The pro-life and traditional marriage side wants to eliminate abortions and restrict the personal

long-standing but misleading stereotype—albeit one that few in his academic audience may be inclined to challenge. In fact, Laycock’s own more detailed analysis persuasively contradicts this particular accusation.

With respect to contraception, for example, Laycock explains—correctly, I think—that “[n]early all Americans think they are entitled to use contraception and that it is no one else’s business.”³⁰ These “nearly all Americans” include the religious conservatives. Consequently, “[i]t is unimaginable that any American state would now attempt to ban contraception”—indeed, “the bishops gave up that battle long ago.”³¹ And a page or two before his accusation that I quoted above, Laycock reports that although religious conservatives continue to oppose abortion and same-sex marriage:

Every other form of noncommercial consensual sexual behavior has been deregulated, either de facto or de jure, and religious conservatives have mostly acquiesced. There is no significant lobbying to enforce or reenact fornication laws, adultery laws, sodomy laws, or laws against gay and lesbian sex. No-fault divorce is much lamented, but there is no significant effort to roll it back. Even the effort to restrict pornography has largely collapsed, with its energies redirected to child pornography. On all these issues, churches teach what people morally *should* do, but they no longer seek to control by law what people *may* do.³²

So it seems that by-and-large, religious conservatives are *not* trying to “regulate other people’s sex lives.”³³ Indeed, that description seems subtly askew even in the area of abortion. As Laycock knows, and reports, conservative Christians oppose abortion because they believe the practice takes the lives of innocent human beings.³⁴ These conservatives are acting, as they suppose, to protect those lives. It is true, to be sure, that restrictions on or prohibitions of abortion would have constraining effects on some people’s sexual activity and decisions. Even so, it is misleading to declare that the conservatives are trying to “regulate other people’s sex lives,” as if this were the purpose or objective of their anti-abortion efforts—just as it would be a distortion to say that environmentalists are trying to “destroy jobs and force Americans into unemployment.” Although some restrictions favored by environmentalists could foreseeably have such effects, that is

lives of gays and lesbians.”).

30. Laycock, *Culture Wars*, *supra* note 7, at 867.

31. *Id.*

32. *Id.* at 878–89.

33. *Id.* at 867.

34. *Id.* at 878 (“The pro-life side sees [abortion] as killing innocent human beings, and you cannot expect them to be live-and-let-live about that.”)

presumably not the goal or purpose of such restrictions.

All of this is not to say that secular egalitarians would have nothing to worry about if conservative Christians were to achieve political dominance. More specifically, if conservative Christians achieved more political power than they currently have (including within the judiciary), such that they were able to enact their stated agenda, then in the area of sexual equality it seems likely that three unfortunate developments would result—unfortunate from the perspective of the egalitarians. First, abortion would likely be severely restricted or even prohibited. Second, same-sex marriage would not be legalized; laws or judicial decisions already recognizing the institution in a growing number of states would presumably be repealed or overruled. Third, although the right to purchase and use contraceptives would not itself be threatened, the Department of Health and Human Services’ “contraception mandate” would probably be rescinded; even employers without any religious objection would probably not be legally required to provide health insurance that covers contraceptives. To be sure, many employers would likely provide such coverage anyway for policy or economic reasons; even so, women would be unable to count on their employers, or the government, to supply or subsidize such contraceptives.

Conversely, if the secular egalitarian party or coalition were to achieve dominance and enact its program, we could again summarize the burdensome consequences for religious traditionalists under three main heads. First, legal protections for freedom of conscience would likely be repealed or severely restricted, at least in matters affecting sexuality and sexual conduct. Thus, doctors who have scruples against performing abortions, pharmacists who object to dispensing contraceptives or abortifacients, and employers who object to providing insurance coverage for contraceptives or abortifacients would find little or no relief in the law; they would thus likely be forced to choose between either violating their consciences or withdrawing from their professions or businesses.³⁵

Second, antidiscrimination laws would be applied to prevent discrimination on grounds of sex or sexual orientation. Perhaps a narrow “ministerial exception” would be retained permitting the Catholic church, say, to continue to maintain a male-only priesthood; even so, many religious employers and church-affiliated institutions such as charitable organizations and religious universities would likely have to modify their

35. See Laycock, *Free Exercise*, *supra* note 7, at 418 (“The pro-choice and gay rights groups want conservative believers not just to leave them alone, but to affirmatively assist with abortions and same-sex relationships—or else leave any occupation that might ever be relevant.”).

practices or else, once again, close up shop. This of course is not so much a prediction as a description of what is already happening.³⁶

Finally, it is likely that religious institutions with teachings or practices that offend prevailing egalitarian principles would be treated less favorably in other burdensome though less directly and formally coercive ways. Citing the well-known *Bob Jones* case,³⁷ some proponents of egalitarian views already call for the denial of tax-exempt status to religions whose doctrines and practices are deemed contrary to egalitarian policies.³⁸ The fate of the Christian Legal Society in *Christian Legal Society v. Martinez*³⁹ is another instance: Christian clubs might thus be—and indeed often already are⁴⁰—denied official certification in university settings, thereby excluding them from the benefits that accompany such status, especially including the ability to participate with other student associations in sign-up and promotional activities. These kinds of unfavorable treatment do not flatly prohibit religious associations from existing or living in accordance with their officially disfavored beliefs. But associations that do so are placed at a considerable disadvantage relative to other kinds of associations.

In the relatively short term, therefore, conservative Christians and secular egalitarians face different sets of potential burdens if they find themselves in a politically subordinate position and hence in need of

36. For a discussion of this dilemma in the area of adoption services, see Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008). More generally, Brett Scharffs observes “a much deeper pattern of equality trumping liberty, both within the United States and beyond. Indeed, in surveying law and religion trends around the world over the past twenty years, one of the most notable patterns is the systematic preferencing of equality over liberty interests.” Brett G. Scharffs, *Equality in Sheep’s Clothing: The Implications of Anti-Discrimination Norms for Religious Autonomy*, 10 SANTA CLARA J. INT’L L. 107, 128 (2012) (discussing cases in the United States, Canada, and Germany in which antidiscrimination laws were held to override claims of religious freedom).

37. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

38. See, e.g., Corey Brettschneider, *How Should Liberal Democracies Respond to Faith-Based Groups that Advocate Discrimination? State Funding and Nonprofit Status*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 72, 81 (Austin Sarat ed., 2012) [hereinafter ACCOMMODATION AND ITS LIMITS] (“[I]t is often compatible with rights of free speech for the state to refuse to subsidize viewpoints that are hateful or discriminatory. . . . [T]he ‘public benefit’ condition for nonprofit status should be interpreted as requiring, at minimum, that the group not seek to undermine the values of free and equal citizenship.”); Caroline Mala Corbin, *Expanding the Bob Jones Compromise*, in ACCOMMODATION AND ITS LIMITS, *supra*, at 123, 134–35 (arguing that organizations that discriminate against women should not receive tax-exempt status).

39. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010).

40. See Timothy J. Tracey, *Christian Legal Society v. Martinez: In Hindsight*, 34 U. HAW. L. REV. 71, 84 n.106 (2012) (listing cases involving Christian student organizations that were denied recognition by their universities).

accommodation. There is no obvious or uncontroversial way to measure and compare those different sets of potential burdens. For one thing, each side in the culture wars, because it does not share the convictions or commitments of its culture war opponents, will naturally see the burdens faced by those opponents as relatively trivial: the risk, it will seem, is only that of being legally induced to do what they plainly ought to do anyway.⁴¹ So, for example, if you see a moral objection to contraception as hopelessly anachronistic and almost unintelligible, it will be easy to view the burden of a contraceptive mandate on objecting institutions as negligible.⁴² But if you regard the use of contraceptives as a grave moral evil and the provision of contraception coverage as a form of cooperation with that evil, the burden becomes much more formidable: basically, your choice is between committing a serious moral transgression and abandoning your career, or perhaps shutting down a business that you may have spent a lifetime building.

In addition, the extent of the burden would depend on other contingencies. For example, if the legalization of same-sex marriage was denied and rolled back but an approximately equivalent status of “domestic partnership” was recognized—as was the case in California before judicial intervention⁴³—the direct burden on same-sex couples would largely be limited to the expressive harm discussed earlier. Similarly, if the contraception mandate is withdrawn but contraceptives are readily available in other ways—through organizations such as Planned Parenthood, for example—the actual burden on women would be real but relatively modest. Similarly, the extent of the burden entailed by restrictions on abortion would depend on whether exceptions—such as exceptions for rape and incest—were included.

Although there is no uncontroversial metric for assessing relative burdens, it seems clear that the risks faced by the opposing sides are different and asymmetrical. Speaking in general terms, we can say that the risk to the secular egalitarians lies in the possibility of limited but direct

41. In this vein, arguing against any exemption of religious objectors from general laws, Brian Barry compares this policy to “a course of chemotherapy” that “holds out the hope of destroying the malignant features of religion.” BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 25 (2001). Barry acknowledges that this treatment will be “experienced as debilitating by believers,” but he regards this as a good thing, given his opposition to that sort of strong religion. *Id.*

42. *Cf.* Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. 1469, 1470, 1475 (2013) (arguing that the contraception mandate does not substantially burden Catholic religion because most American Catholics do not oppose contraception anyway).

43. *See supra* note 22 and accompanying text.

restrictions on their freedom in matters of sexuality. Probably the clearest risk of this kind is still the possibility of significant restrictions on abortion.

By contrast, the major risk faced by religious conservatives is that of being put to the choice of violating their convictions or commitments—of being unfaithful to their God, as they perceive the matter—or instead, being increasingly relegated to the margins of society. A determination to maintain fidelity to their convictions might well mean that they could not own and operate a large business or university, or work as a physician, pharmacist, wedding photographer, or landlord. Indeed, as Laycock explains, much antidiscrimination activity in this context seems calculated to drive religious conservatives out of these professions.⁴⁴ In addition, although religion no doubt transcends economics, insofar as it is practiced by and through human beings it is not immune to economic influences.⁴⁵ Thus, forgoing tax-exempt status or university certification may place a religion at a serious competitive disadvantage in the marketplace of causes and associations—a disadvantage that may portend marginal status and long-term decline.

This observation already points us beyond the relatively short time frame indicated by the competing sides' currently articulated goals and agendas and prompts a more long-term question. Suppose that one party or the other achieves and solidifies a position of political dominance: what are the prospects that this now-dominant party will be inclined to an overall position of tolerance or accommodation?

III. THE ASYMMETRICAL PROSPECTS OF ACCOMMODATION

That question is inherently conjectural, and it also prompts a reminder of my introductory caveat: the various supporters of each party surely differ in their inclination to tolerate or accommodate opposing views and practices. Even so, the question is an important one. So, if we step back from the specific controversies of the day and extend our time frame to, say, the remainder of the twenty-first century or even beyond, then from which party in the culture wars—the religious conservatives or the secular egalitarians—can we more confidently expect to see an overall attitude or policy of toleration and accommodation if that party happens to flourish and to achieve political dominance?

44. See *supra* note 35 and accompanying text.

45. See Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59, 89–95 (2013) (discussing the study of religion from an economic perspective).

A. TOLERATION AS AN ACHIEVEMENT

It is important to begin, I think, by noticing one common but mistaken assumption that might skew our expectations on this issue. Today, in some cultural contexts, it is often assumed that toleration is in a sense the rational and reasonable and natural posture—the posture that humans would naturally assume if their thoughts or passions were not somehow distorted or misdirected. On this view, the propensity of some people or some officials to take an interest in other people’s concerns (religion, marriage, sexual practices, and so forth) will appear to be a departure from this reasonable, natural position—a departure that looks to reflect a kind of pathology. Intolerance seems to call for explanation in terms of some sort of unfortunate, dysfunctional psychological urge (based on insecurity, perhaps, or maybe aggression, or a need to dominate⁴⁶) to interfere where one has no legitimate concern and nothing to gain except the perverse satisfaction of bossing other people around.

As against this assumption that toleration is natural and intolerance an aberration, Justice Holmes famously expressed the opposite view. “Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”⁴⁷ Holmes’s assessment seems supported by a vast amount of historical experience. Historians tell us that until the last few centuries or so, toleration was usually not viewed as a virtue at all, but rather as a sign of weakness, subversiveness, or at least lack of commitment to the truth.⁴⁸

Holmes of course went on to attempt a rationale for resisting that logic of persecution. Whether or not his “marketplace of ideas” rationale was successful,⁴⁹ however, Holmes at least understood that toleration is not just a sort of natural, effortless default position, but rather something that has to be argued for, or worked at. Toleration is an achievement, not a sort of easy

46. In this vein, Martha Nussbaum associates what she perceives as the intolerance of the religious right with “fear and insecurity,” “sheer selfishness,” and a desire to “lord it over” others. NUSSBAUM, *supra* note 21, at 8, 28.

47. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

48. See ALEXANDRA WALSHAM, CHARITABLE HATRED: TOLERANCE AND INTOLERANCE IN ENGLAND, 1500–1700, at 228–30 (2006). Ethan Shagan observes that “[b]efore the 1640s, the state’s prerogative to punish religious deviance was almost unanimously praised as moderate, while broad claims for religious toleration were almost unanimously condemned as extremist.” ETHAN H. SHAGAN, THE RULE OF MODERATION 288 (2011).

49. Holmes’s rationale has been much debated. *E.g.*, Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649 (1987).

natural inheritance.⁵⁰

We need not try to decide, however, whether persecution of difference is irrationally pathological or instead “perfectly logical,” as Holmes asserted. The important point for our purposes is simply that if we consider the matter from a historical and empirical perspective, then it seems evident that human beings often are inclined to attempt to prevent their neighbors from believing or saying things deemed to be false, and from engaging in practices deemed to be wrong or immoral. Toleration is not preordained to be the “natural” attitude or position; it is an achievement (of contestable value, to be sure). A movement’s capacity for tolerance may accordingly depend on whether there are resources or rationales supporting tolerance within the movement’s beliefs; it may depend as well on historical conditions that encourage the movement to develop and articulate these rationales and to put them into practice.

This observation leads to a slight reformulation of the question this part began with. Which party in the cultural struggle, we can ask—the conservative Christian party or the secular egalitarian party—is better endowed with the rationales and the experience that would support a stance of accommodation or toleration if the party has the good fortune to become a politically dominant power? That is a complex and speculative question, obviously; here I can do no more than venture some general observations.

B. CHRISTIAN TOLERATION

In the case of Christians, we have a body of developed doctrine and almost two millennia of experience from which to make our projections. This evidence is complex and mixed. Over the centuries, the Christian religion has been the source both of massive intolerance—we can incorporate by reference here the usual litany of Christian offenses: the Inquisition, the Crusades, the burning of witches and so forth—and of a principled commitment to and practice of religious and other forms of toleration.

A common view holds that the pagans of Late Antiquity were broadly humane and tolerant, and that the new Christian rulers who came to power with Constantine and his successors instituted a reign of intolerance.⁵¹ As I

50. I have developed this point at much greater length in Steven D. Smith, *Toleration and Liberal Commitments*, in *TOLERATION AND ITS LIMITS* 243 (Melissa S. Williams & Jeremy Waldron eds., 2008); Smith, *supra* note 49.

51. See, e.g., RAMSAY MACMULLEN, *CHRISTIANITY AND PAGANISM IN THE FOURTH TO EIGHTH CENTURIES* 2 (1997) (describing ancient paganism as a “spongy mass of tolerance and tradition”).

have argued at length elsewhere,⁵² the truth is considerably more complicated. Very briefly: pre-Christian Roman rulers tended to be pragmatic and external in their approach to religion. The Romans cared little about the internal beliefs and attitudes of their subjects; so long as these subjects performed their civic responsibilities and did not stir up division or rebellion, the Romans were content to let those subjects worship how and whom they chose. But if a religion came to be viewed as subversive, it would be savagely repressed.⁵³

Christianity, by contrast, cared deeply about the internal condition of people, and about what people believed; and this concern could support both a more intrusive intolerance and a more principled commitment to toleration or religious freedom. Both propensities have been manifest throughout the ensuing centuries, but there has also been a discernible trajectory. As a rough generalization, we might say that over time the commitments to freedom and toleration have become more prominent and accepted, at least in the West, while the bases for intolerance have receded in Christians' understanding of what their Gospel prescribes.

So if we ask about the likelihood of Christians today demonstrating tolerance, there are reasons to predict a fair measure of toleration. First, Christian beliefs contain the *intellectual resources or justifications* to support policies of toleration of non-Christian beliefs and practices. Two justifications in particular should be noticed. One is the rationale of the *imago dei*—the idea, taken from Hebrew scripture, that *all* human beings, of every race and creed, are created by and in the image of God.⁵⁴ This belief provides a foundation for commitments to human dignity and to the equal worth of persons; indeed, some have argued that no secular justification to date has been able to do the work of that biblical justification.⁵⁵

52. See SMITH, *supra* note 19, at 14–47.

53. See J. A. NORTH, ROMAN RELIGION 63 (2000). North explains:

[I]f there was tolerance, it was not tolerance born of principle. So far as we know, there was no fixed belief that a state or an individual ought to tolerate different forms of religion; that is the idea of far later periods of history. The truth seems to be that the Romans tolerated what seemed to them harmless and drew the line whenever there seemed to be a threat of possible harm; only, they saw no great harm in many of the cults of their contemporary world

Id.

54. Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism*, in EQUALITY: SELECTED READINGS 282, 295 (Louis P. Pojman & Robert Westmoreland eds., 1997) (“The argument implicit in the Judeo-Christian tradition seems to be that God is the ultimate value and that humans derive their value by being created in his image and likeness.”).

55. See, e.g., JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE’S POLITICAL THOUGHT 243 (2002); MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 11–41 (1998); Pojman, *supra* note 54.

Another distinctive Christian rationale derives from the belief that only a free and voluntary faith is acceptable to God. Locke explained the basic idea: “All the life and power of true religion consist in the inward and full persuasion of the mind; and faith is not faith without believing.”⁵⁶ Consequently, compelled but insincere professions of faith, “far from being any furtherance, are indeed great obstacles to our salvation. . . . add[ing] unto the number of our other sins those also of hypocrisy, and contempt of his Divine Majesty.”⁵⁷ This belief can be, and historically has been, extended beyond religion to cover other kinds of belief, expression, and even action, thereby animating the development of legal commitments to freedom of religion and freedom of speech and, more broadly, to personal autonomy.

Of course, if I may indulge in understatement, these rationales for toleration have not always been manifest in Christian practice: once again, the litany of egregious offenses is familiar. But that observation points to another reason to expect Christians *today* to be inclined toward toleration of those who disagree with them. Although the rationales for toleration were present (and were prominently articulated) from the outset,⁵⁸ in the centuries following the political ascendancy of Christianity in the late Roman Empire, and in response to the ongoing threat of conquest by so-called “barbarians,” and later under the canopy of Christendom, it was easy for rulers and others to downplay these more lenient themes in favor of Christian beliefs more supportive of political and cultural uniformity, and thus of intolerance. But in the centuries since the Protestant Reformation and the wars of religion, Christendom has irretrievably collapsed, and Christians have been led, or perhaps forced, to come to terms with pluralism. In this situation, the rationales for freedom have been articulated and recited over and over again, until they are woven inextricably into the typical contemporary Christian’s understanding of the Gospel.

The fact is that by now Christians in Europe and North America have had the experience of centuries of living with pluralism, democracy, and a

56. JOHN LOCKE, A LETTER CONCERNING TOLERATION 119 (Paul Negri & Tom Crawford eds., Dover Publ’ns 2002) (1689).

57. *Id.*

58. Thus, Lactantius, advisor to Constantine and tutor of his children, wrote that “[l]iberty has chosen to dwell in religion. For nothing is so much a matter of free will as religion, and no one can be required to worship what he does not will to worship.” Brian Tierney, *Religious Rights: A Historical Perspective*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT 29, 32 (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996). See also PAUL VEYNE, WHEN OUR WORLD BECAME CHRISTIAN: 312–94, at 90 (Janet Lloyd trans., 2010) (“Throughout the fourth century, it was repeated that it was not possible to compel consciences or to force people to believe.”).

significant scope of freedom for diverse opinions and lifestyles; indeed, all of these things evolved within a broadly Christian cultural and political framework. And Christians have by and large accepted and internalized the theological rationales supportive of such arrangements. There are exceptions, to be sure—the so-called Christian Reconstructionists, for example, or the Westboro Baptists. And yet almost all American Christians, conservative or liberal, find these extremists a deplorable embarrassment.

To be sure, their Christian beliefs and values may lead more mainstream traditionalists to take positions on issues such as abortion or same-sex marriage that secular egalitarians find objectionable and oppressive. It is possible to characterize those unwelcome conclusions as “intolerant”—possible, but not perspicuous. Different faiths, ideologies, and political movements will inevitably reach different specific conclusions regarding what law should prohibit, permit, and encourage: to characterize such differences under the castigating label of “intolerance” risks depriving the term of useful meaning.

If instead we ask whether even conservative Christians today in the West are inclined to impose “Christianity” on their fellow citizens, or to place disparate legal burdens on non-Christians, I submit that the answer is quite clearly no. The major wars of religion in the West ended three-and-a-half centuries ago, and there is in this country neither any appreciable movement toward nor any possibility of returning to the “confessional state,” or to the conditions of Christendom. Indeed, as Laycock notes,⁵⁹ there is no impetus today or any realistic chance to return even to the 1950s, when the law reflected Christian sexual morality in a more thorough-going way by prohibiting (at least officially, though rarely in practice) fornication, adultery, and homosexual conduct.⁶⁰

C. ARE SECULAR EGALITARIANS RELIABLY TOLERANT?

Whether a similar policy of accommodation or toleration can be expected of potentially triumphant secular egalitarians is less certain, in part because secular egalitarianism does not have the same long history or developed body of doctrine that Christianity has.⁶¹ The idea of equality has

59. See *supra* notes 30–33 and accompanying text.

60. For a review of the situation in the 1950s, see ROBERT E. RODES, JR., ON LAW AND CHASTITY 9–24 (2006).

61. In this respect, it may be helpful to distinguish contemporary secular egalitarianism from traditional mainstream liberalism, which *does* have considerable experience with toleration as well as the intellectual resources to justify it: think of John Stuart Mill. I would classify Laycock and his fellow

deep and venerable roots in the American experience, of course: we associate it with the Jeffersonian assertion in the Declaration of Independence that “all men are created equal” and with Tocqueville’s classic study of *Democracy in America*, with its sober, guarded celebration of what Tocqueville viewed as the new and transforming movement to equality. But any claims of contemporary egalitarians to a direct genealogical connection to luminaries such as Jefferson and Tocqueville are contestable at best.⁶²

As Peter Westen and others have famously demonstrated,⁶³ the basic normative commitment to “equality,” or to the idea that likes should be treated alike, is an empty vessel to which no one does or could really object—we are all egalitarians in the broad sense, and could hardly be otherwise—but whose substantive content must come from other sources. For Jefferson, that content was supplied by a providential worldview largely inherited from Christianity.⁶⁴ Tocqueville’s study was similarly pervaded by invocations of providence.⁶⁵ Contemporary egalitarians, by contrast, typically make a point of disavowing reliance on theological inputs, which are viewed as “sectarian.” It is arguable, consequently, that contemporary secular egalitarianism is a novel historical phenomenon,⁶⁶ with little more than a verbal tie to the more venerable American practices and commitments associated with the theme of “equality.” Whatever the sources of the substantive content of contemporary egalitarianism may be, they do not come from traditional Christian or Judeo-Christian beliefs—not consciously at least.

Though secular, however, contemporary egalitarianism gives away nothing to traditional religion in the area of zeal, or fervor. Writing presciently a third of a century ago, the sociologist and political theorist Robert Nisbet observed the potential power of what he called “the New Equality.”⁶⁷ Nisbet argued that

moderators within the broad tent of traditional mainstream liberalism.

62. See generally Steven D. Smith, *Recovering (From) Enlightenment?*, 41 SAN DIEGO L. REV. 1263 (highlighting discrepancies between classical Enlightenment and modern Enlightenment thought).

63. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

64. Overwhelming evidence for this assertion is marshaled in DANIEL BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* (1993).

65. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 12, 18, 37, 56, 60, 277, 281, 282, 301, 370, 378, 397, 405, 413, 446, 486, 704, 705 (George Lawrence trans., J. P. Meyer ed., HarperCollins 1988) (1835).

66. More generally, modern secular society itself seems to be a new thing—different, as Charles Taylor argues, from “anything else in human history.” CHARLES TAYLOR, *A SECULAR AGE* 1 (2007).

67. ROBERT NISBET, *TWILIGHT OF AUTHORITY* 180–93 (1975).

[e]quality has a built-in revolutionary force lacking in such ideas as justice or liberty. . . . Equality feeds on itself as no other single social value does. It is not long before it becomes more than a value. It takes on . . . all the overtones of redemptiveness and becomes a religious rather than a secular idea.”⁶⁸

Nisbet also notes that

it would be hard to exaggerate the potential spiritual dynamic that lies in the idea of equality at the present time. One would have to go back to certain other ages, such as imperial Rome, in which Christianity was generated as a major historical force, or Western Europe of the Reformation, to find a theme endowed with as much unifying, mobilizing power, especially among intellectuals, as the idea of equality carries now.⁶⁹

If Nisbet’s observations were broadly accurate in 1975, they seem even more apt today. Whether contemporary egalitarianism also contains within itself rationales for self-restraint or toleration comparable to the *imago dei* and “voluntary faith” rationales associated with Christianity remains uncertain. Maybe such rationales do exist, or could be developed. Conversely, it is possible that whatever propensities to tolerance the new secular egalitarians currently exhibit—like, arguably, their commitment to equality itself⁷⁰—are a residual carry-over from the struggles of the Christian past, and that over time the egalitarians will be even less inclined to accommodate what they will view as backward and oppressive views and ways of life.⁷¹

But let us suppose for purposes of argument that contemporary egalitarianism does contain incipient justifications for toleration, or could

68. *Id.* at 202.

69. *Id.* 201–02. *Cf.* DE TOCQUEVILLE, *supra* note 65, at 538 (“When inequality is the general rule in society, the greatest inequalities attract no attention. When everything is more or less level, the slightest variation is noticed. Hence the more equal men are, the more insatiable will be their longing for equality.”).

70. See Pojman, *supra* note 54, at 295; WALDRON, *supra* note 55, at 243; PERRY, *supra* note 55, at 11–41.

71. Jeremy Waldron argues that John Locke’s commitment to equality was grounded in religious assumptions, and that modern efforts to support the commitment have to this point proven unavailing. See generally WALDRON, *supra* note 55. Waldron explains:

[M]aybe the notion of humans as one another’s equals will begin to fall apart, under pressure, without the presence of the religious conception that shaped it. . . . Locke believed this general acceptance [of equality] was impossible apart from the principle’s foundation in religious teaching. We believe otherwise. Locke, I suspect, would have thought we were taking a risk. And I am afraid it is not entirely clear, given our experience of a world and a century in which politics and public reason have cut loose from these foundations, that his cautions and suspicions were unjustified.

Id. at 243.

import them. Even so, it has had little time and opportunity for such restraints to develop. Following Nisbet, we might thus compare contemporary egalitarianism to Christianity in the fourth century. Christianity contained justifications for tolerance or religious liberty, and these justifications were cogently articulated by Christians such as Constantine's advisor Lactantius;⁷² nonetheless, in the intoxicating exuberance of newly achieved political dominance, Christian rulers felt little inclination to act on these rationales. Consequently, centuries passed before these rationales came to prevail in Christian thought and practice. Triumphant secular egalitarians would be like the early, newly empowered Christians, and unlike the paganism of Late Antiquity, in that they care intensely about what is in people's minds and hearts—about even “unconscious” prejudices⁷³—and they are also like the fourth-century Christians in that they have thus far had little opportunity to develop and act on whatever resources for self-restraint their movement may contain. Indeed, we might extend the analogy: contemporary secular egalitarians are like fourth-century Christians in that they evince an acute sense of resentment over perceived historical and present oppression from their political and cultural opponents, and such resentment is hardly conducive to attitudes of respect for or accommodation of those opponents.⁷⁴ This observation is consistent at least with the efforts of secular egalitarians, noted by Laycock, to use antidiscrimination laws to punish recalcitrant photographers, bakers, and counselors and drive them out of business even when gays and lesbians do not actually want their services.⁷⁵

Two qualifications to this assessment should be noted. First, once again there is the caveat: egalitarians are not all of a piece. Just as is the case with Christians, or with people of any other large-scale movement or persuasion, some are likely inclined to be accommodating of difference while others are not. The problem, however, from the Christian perspective, is that the courts together with antidiscrimination laws are available to the tolerant and the intolerant alike. Thus, it could well be the case that many same-sex couples and many other Americans who support

72. See *supra* note 58.

73. The classic law review article on this topic is Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 351–52 (1987).

74. H. A. Drake contends that imperial policy under Constantine and his son Constantius was broadly tolerant and inclusive. H. A. DRAKE, *CONSTANTINE AND THE BISHOPS: THE POLITICS OF INTOLERANCE 298–305* (2000). However, the effort of the emperor Julian (“the Apostate”) in the mid-fourth century to restore paganism by legally marginalizing Christianity revived memories and fears of the persecutions under Diocletian earlier in the century, thereby provoking a repressive backlash following Julian's death. *Id.* at 431–36.

75. See *supra* note 13 and accompanying text.

the secular egalitarian movement would be happy enough to “live and let live,” as the saying goes, and so would not be motivated to drive out of business the occasional photographer or baker who has scruples against same-sex marriage. But so long as some individuals *are* so motivated, and so long as at least some judges are happy to oblige, the scrupulous photographer or baker remain at risk.⁷⁶

Second, prediction is always hazardous, and assessments of a relatively new and amorphous movement are inherently speculative. To the cultural opponents of the new egalitarianism, this is precisely the concern. We can speculate that if secular egalitarians achieve political domination, they *might* turn out to be admirably tolerant—more so than some of their current actions might suggest.⁷⁷ That possibility can’t be ruled out. But would you want to trust your fortunes, and your future, to that sort of conjectural possibility?

CONCLUSION

Moderators such as Douglas Laycock propose a “live and let live” compromise in which same-sex marriage would be legalized but ample exceptions would be adopted to protect free exercise rights and interests, and they express impatience with both sides in the cultural wars for declining to embrace what the moderators regard as an eminently fair compromise. But in fact neither conservative Christians nor secular egalitarians are being merely intransigent. Rather, both sides understand that it is better to tolerate than to be tolerated, and they perceive risks if they are placed in a position of needing accommodation from the other side. These risks are real and serious—perhaps more serious at this point for religious traditionalists than for egalitarians. It should not be surprising, therefore, that neither side rushes to embrace a position that portends long-term decline and possible repression.

76. See *Elane Photography v. Willcock*, 309 P.3d 53 (N.M. 2013); *Craig v. Masterpiece Cakeshop, Inc.*, Case No. CR 2013-0008 (Colo. Office of Admin. Cts. 2013) (initial decision).

77. See, e.g., Ross Douthat, Op-Ed., *The Case of Brendan Eich*, N.Y. TIMES (Apr. 8, 2014), <http://douthat.blogs.nytimes.com/2014/04/08/the-case-of-brendan-eich> (discussing the ouster of a CEO for his past donation to a ballot initiative—Proposition 8—that eliminated the right of same-sex couples to marry).

