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## ACCOMMODATING RELIGION AND LAW IN THE TWENTY-FIRST CENTURY

ANDREW J. KING \*

Ever since the United States Supreme Court incorporated the First Amendment's Establishment and Free Exercise Clauses into the Fourteenth Amendment and began overseeing state policy regarding religion, scholars have pondered the relationship of law and religion. Although religion and state are formally separated, religion has had a profound impact on law at the level of culture. Current social policy debates over same-sex marriage and embryonic stem cell research are only the latest manifestation of how religious concerns can press on public issues.

In the three contributions to this symposium that are the subject of this comment, Professors Gildin, Taylor, and Silecchia examine different aspects of the intersection of law and religion. In their own ways, each asks how law can accommodate religious views and practices. Professors Taylor and Silecchia look at law from within a religious tradition. Specifically, Professor Taylor looks at the relationship of Christianity and racism in American society, and Professor Silecchia examines the role that Catholic social thought can play in the formation of public policy. Professor Gildin, on the other hand, takes a position outside of any particular religion in assessing the vulnerability of minority faiths to majority intolerance. Professor Gildin's article grows out of the scholarly reaction to the Supreme Court's 1990 decision in *Employment Division v. Smith*<sup>1</sup> (and the subsequent limiting of the Religious Freedom Restoration Act (RFRA)<sup>2</sup> in *City of Boerne v. Flores*<sup>3</sup>) that made law professors pessimistic over the willingness of federal courts to protect civil liberties.

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1. 494 U.S. 872 (1990).

2. Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. §2000bb (1-4) (2000).

3. 521 U.S. 507 (1997).

## I. GILDIN

Professor Gildin approaches the relationship of religion and the state from the side of government. In light of the decisions in *Smith* and *City of Boerne*, rejecting the compelling state interest test, Professor Gildin asks whether minority religions can continue to anticipate judicial protection from burdens imposed by neutral state legislation.<sup>4</sup> In an earlier article written after *City of Boerne*, Professor Gildin urged the states to adopt their own versions of RFRA.<sup>5</sup> In the article presented in this symposium, he examines whether minority religions can rely on state courts for similar protection. Since state constitutions contain bills of rights supporting freedom of conscience, the state courts are a potential guarantor of free exercise. Professor Gildin, however, is less than sanguine about the extent to which minorities can expect full protection for their practices.

The starting point for Professor Gildin's concern is Justice Scalia's statement in *Smith*:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.<sup>6</sup>

Scalia's assertion that the protection of minority religions from the burden of general legislation must be left to the legislatures caused concern among civil libertarians. As Professor Gildin notes, minority religions, which lack the "political clout" to defeat legislation, will find themselves disadvantaged.<sup>7</sup> If the legislature is unwilling to hear their plea, their only hope lies in the willingness of state judiciaries to create exemptions.

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4. See Gary S. Gildin, *The Sanctity of Religious Liberty of Minority Faiths Under State Constitutions: Three Hypotheses*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 21 (2006).

5. Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL'Y 411 (2000).

6. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

7. Gildin, *supra* note 4, at 25-26.

Professor Gildin may have overstated the likelihood of legislatures remaining deaf to the needs of minority faiths. For example, soon after the *Smith* decision, Congress enacted legislation protecting the Native American Church's use of peyote from federal drug laws.<sup>8</sup> This past term the Supreme Court upheld both the application of RFRA to the federal government and the constitutionality of section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),<sup>9</sup> RFRA's more limited successor. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*,<sup>10</sup> the Court let stand an injunction blocking enforcement of the Controlled Substances Act<sup>11</sup> against the minority religion, and in *Cutter v. Wilkinson*,<sup>12</sup> it upheld the application of RLUIPA to the nation's prison system. Thus, while it is true that prior to *Smith* the compelling governmental interest test gave more protection to minority religious practices, it is not clear that since *Smith* there has been a significant loss in protection. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>13</sup> Justice Kennedy applied language from *Smith* to closely examine the ordinance that barred Santeria's religious practice.<sup>14</sup> Moreover, even when the federal courts used the compelling governmental interest test, it was no guarantee of protection. In *Lyng v. Northwest Indian Cemetery Protective Association*,<sup>15</sup> the Supreme Court held that the Native American plaintiffs could not prevent the U.S. Forest Service from building a road through land held sacred by the Indian tribe.<sup>16</sup> Although Professor Gildin acknowledges that minorities now seem

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8. 42 U.S.C. § 1996a (1994).

9. 42 U.S.C. §§ 2000cc-1(a) (2000).

10. 126 S. Ct. 1211, 1225 (2006).

11. 21 U.S.C. §§ 801-904 (2000).

12. 544 U.S. 709, 725-26 (2005).

13. 508 U.S. 520 (1993).

14. *Id.* at 542. Aside from finding that Hialeah had targeted the Church of the Lukumi, Justice Kennedy also employed equal protection analysis to evaluate the neutrality and generality of the legislation. *Id.* at 540-43.

15. 485 U.S. 439 (1988).

16. *Id.* at 458. While indirect coercion or penalties on free exercise . . . are subject to scrutiny . . . This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.

*Id.* at 450-51. In fact, prior to *Smith*, most of the cases in which the Supreme Court invoked strict scrutiny involved the granting of benefits.

protected from federal legislation, he is correct to worry about state legislation that is beyond the reach of the federal courts.

Professor Gildin finds the underlying theoretical foundation for courts to defend minority religion in James Madison's 10th Federalist.<sup>17</sup> Gildin observes that "our democracy relies upon . . . limits upon the power of legislative majorities to burden the liberty of individual conscience."<sup>18</sup> Gildin may be asking too much of Madison. Madison's concern was the danger of majority control of the government. His solution in Federalist No. 10—the encouragement of a multiplicity of interest groups—was meant to prevent political, religious and economic factions from coalescing into a majority party. There is no indication, however, that Madison meant the later-adopted First Amendment to protect minority religions from government supervision under the police power. In fact, it is likely that Madison and the framers of the various state religion clauses only meant to shield conscience from coercion, not to remove all burdens on practice. Underlying the nineteenth century's approach to religious freedom was the belief-act dichotomy. Its explicit adoption by Justice Waite in *Reynolds v. United States*<sup>19</sup> confirmed the view that religious practice had always been subject to local control.<sup>20</sup> While twentieth century courts have recognized the importance of ritual to many religions, religious practices that offend local norms are still subject to control.<sup>21</sup> It is this control that is Professor Gildin's central concern.

Addressing the question whether religious minorities can rely on state courts to protect them from legislative burdens, Professor Gildin points to an apparent paradox. In states which have adopted the compelling governmental interest test either by judicial interpretation or legislation, courts have refused to apply strict scrutiny to bans on same-sex marriage. If courts are unwilling to confront legislatures that ban same-sex marriage, then they may be reluctant to stand up for minority religions, as well. Using same-sex marriage as a proxy for an

17. THE FEDERALIST NO. 10 at 56-65 (James Madison) (Jacob E. Cooke ed., 1961).

18. Gildin, *supra* note 4, at 27.

19. 98 U.S. 145 (1878).

20. *Id.* at 164. ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

21. In dealing exclusively with Free Exercise, Gildin may have given insufficient attention to the recent changes the Court has brought to the Establishment Clause. The Court's abandonment of strict separation shows that the Court is willing to accommodate religion when it comes to government aid. While such aid normally favors the major religions, Court-mandated "neutrality" gives minority faiths equal access to governmental assistance.

unpopular religious practice is an intriguing idea. In addition to abortion, same-sex marriage is one of the most emotionally charged contemporary moral issues.

Professor Gildin starts with public opinion polling that shows opposition towards same-sex marriage is strongest among persons with a higher degree of religious affiliation. He posits three hypotheses on the issue of whether a state court that has adopted the compelling interest test would strike down legislation banning same-sex marriage. First, he asserts that there may be no relation between the adoption of the compelling interest test in religious matters and a ban on same-sex marriage. If that is the case, then religious minorities who seek protection from the majority can have confidence in the courts. The strongest basis for this view is that there is no religious group that makes same-sex marriage a core part of its practice. Therefore, there may be no connection between a ban on same-sex marriage and a threat to religious practice, even though the impetus for the ban is religious in nature. On the other hand, it must be pointed out that prior to the compelling interest test the Supreme Court had little difficulty upholding the ban on Mormon polygamy against the claim that polygamy was central to Mormon religion.<sup>22</sup>

The second hypothesis starts from the proposition that states adopted the compelling governmental interest test in reaction to the *Smith* decision because they considered *Smith* a “mistake.” Implementing strict scrutiny had less to do with their concern for minorities and more with the status of the majority religions. If the impetus for the compelling governmental interest test came from the majority faiths who saw *Smith* as denigrating religious liberty vis à vis other liberties, then the restoration of strict scrutiny carries only symbolic value. In that case, strict scrutiny is not likely to offer effective protection to the minority religions in the face of majority opinion.

Professor Gildin states his third hypothesis in what he calls “utilitarian terms.” Professor Gildin believes this hypothesis to be most likely. Courts will protect minorities so long as the protection does not impose too great a cost on mainstream values (or on a court’s prestige). Thus, the compelling interest test will not provide minority protection if the courts are asked to stand against strongly-held majority views.

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22. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

If same-sex marriage is truly a proxy for minority religions, then recent decisions by state courts on same-sex marriage bear out the likelihood of Professor Gildin's third hypothesis.<sup>23</sup> In these cases the courts backed away from protecting the gay and lesbian minority in the face of strongly held public opinion. The courts followed Scalia's lead in *Smith* and deferred to state legislative judgment and popular referenda. Although the same-sex marriage issue does not involve a religious minority, it is clear that a strong majority may convince the judiciary to exercise restraint and to leave the issue with the legislature.

Professor Gildin's general position seems correct. The protection that state courts will accord minorities will be tempered by the courts' judgment as to the likely unpopularity of its decision. To the extent that courts fear a popular backlash, they will be less likely to draw on a rights-based jurisprudence to protect a minority. It is hard to extrapolate from views regarding homosexual rights, however, to the specific issue of religious minorities. In our culture, religious minorities have a higher status than gay and lesbian groups. Legislation that coerces or denies equal treatment to religion is at the heart of the Supreme Court's current view of Free Exercise. Ultimately, an unpopular minority religion may have to fall back on its faith and not its practice. Like the Mormons after the *Reynolds* decision, a subsequent change in practice can bring the religious minority into line with the majority and gain it acceptance.<sup>24</sup>

## II. TAYLOR

Professor Taylor takes a new look at racism in America.<sup>25</sup> While the usual explanations for racism's hold on American society

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23. See, e.g., *Hernandez v. Robles*, 1 No. 86 (N.Y. July 6, 2006) (rejecting the claim that New York's marriage law discriminates against homosexuals); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (upholding the state Defense of Marriage Act that prohibited same-sex marriage); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (upholding a Nebraska constitutional amendment limiting marriage to heterosexual couples); *Perdue v. O'Kelley*, 632 S.E.2d 110 (Ga. 2006) (rejecting a technical challenge to a constitutional amendment banning same-sex marriage).

24. DAVID M. O'BRIEN, *ANIMAL SACRIFICE AND RELIGIOUS FREEDOM: CHURCH OF THE LUKUMI BABALU AYE V. CITY OF HIALEAH* 153, 160-61 (2004). Shortly before its victory, the Church of the Lukumi voted to stop performing ritual animal sacrifices in public. It has continued to flourish. *Id.* at 153.

25. George H. Taylor, *Race, Religion and Law: The Tension Between Spirit and Its Institutionalization*, 6 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 51 (2006).

rest on economic, social or psychological theories, Professor Taylor examines the role of religion. Starting from Professor Derrick Bell's provocative observation that "most racists are also Christian,"<sup>26</sup> Professor Taylor looks at religion to help explain racism's persistence. A religious lens promises to reveal a "deeper foundation" for understanding racism's ontological basis. Since it seems counter-intuitive to blame Christianity for racism's continuation, Professor Taylor promises an analysis that is both novel and unsettling.

The core of Professor Taylor's approach to understanding racism is through the concept of sin. As Freeman Dyson recently observed, Christianity "is a religion for sinners."<sup>27</sup> Drawing on earlier work in which Taylor used the theology of Reinhold Niebuhr to analyze Derrick Bell's writings, he now argues that racism is rooted in human nature. "The racist replaces God as the source of value with self and race" and thus becomes dominated by "pride, self-love, and self-righteousness."<sup>28</sup> Sin causes the racist to see differences between people where he should see only the sameness of humanity. Racism is thus generated by human nature in rebellion from God. This condition drives the racist to seek justification for his beliefs in religion and explains why the liberal hope for racial reconciliation has been thwarted.

Professor Taylor also recognizes the paradox that while Christianity feeds racism, it also rejects it. Moreover, the victims of racism—the former African American slaves—remain largely committed Christians. Professor Taylor addresses this problem by drawing a distinction between faith and doctrine. Thus, while some versions of Christian doctrine may give support to racism, Christian faith repudiates it. For the African Americans who remain loyal to Christianity, their faith gives them hope that racism can be overcome even in the face of a theology that supported slavery and discrimination. Thus, as Professor Taylor points out, Reverend Martin Luther King Jr. observed in his *Letter from Birmingham Jail* that if the white churches failed to support the civil rights movement, King would "turn my faith to the inner spiritual church, the church within the church, as the true *ekklesia* and the hope of the world."<sup>29</sup>

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26. *Id.* at 51 (citing Derrick Bell, speech at the Nat'l Black Law Journal 25th Anniversary Conference: Racism's Religious Perspective (Nov. 18, 2005)).

27. Freeman Dyson, *Religion from the Outside*, N.Y. REV. OF BOOKS, June 2, 2006, at 6.

28. Taylor, *supra* note 25, at 56; George H. Taylor, *Racism as "The Nation's Crucial Sin": Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269, 294 (2004).

29. MARTIN LUTHER KING, JR., *Letter From Birmingham Jail*, in WHY WE CAN'T WAIT 76, 92 (1964).

Although Professor Taylor's discussion of Christianity's role in racism is provocative, it is subject to some criticism. While antebellum Southern clergy invoked Biblical authority in defense of slavery, it is also true, as Rodney Stark has recently pointed out, that these apologists more often invoked secular legal arguments resting on liberty and constitutional law.<sup>30</sup> In looking at the American South Professor Taylor may have used too broad a brush in painting Christianity's complicity. Stark finds that prior to the onset of the slave trade, the Catholic Church had reasoned its way to the condemnation of slavery.<sup>31</sup> While the economic interests behind the slave trade were too strong for the Catholic Church to overcome, the Church was able to make its voice heard in the crafting of the various South American slave codes. Unlike the Catholic Church, however, the eighteenth century Anglican church did not condemn slavery in the English colonies. Without strong Anglican opposition to slavery or an abiding concern for the physical condition of the slaves, the secular authorities in North America were free to design a less humane slave system.<sup>32</sup>

The form of slavery, and its racist character, that took root in the English colonies did so with the tacit approval of the Anglican church. Thus, the different versions of Christianity at play led to legal differences in the various slave societies. Unfortunately for the American colonies, the Protestant version lent itself to racism taking root and the creation of a two-color society. In making his point, Taylor minimizes the role of Christian groups in the abolitionist movement. Yet, as Stark observes, "the abolitionists . . . spoke almost exclusively the language of Christian faith."<sup>33</sup> The fact that Christianity provided a powerful impetus to ending slavery makes it difficult to turn Christianity into a sufficient explanation for racism's continuation. Furthermore, Taylor does not address the extent to which nineteenth century racism was rooted in biological and anthropological theories. With the abolition of slavery, racism could proceed on a biological (and "scientific") basis.<sup>34</sup>

An additional weakness in Professor Taylor's argument is his reliance on Biblical literalism to make his case. While intent on demonstrating how Christian apologists used the Bible to defend

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30. RODNEY STARK, *FOR THE GLORY OF GOD: HOW MONOTHEISM LED TO REFORMATIONS, SCIENCE, WITCH-HUNTS, AND THE END OF SLAVERY* 344-45 (2003).

31. *Id.* at 329-34.

32. *Id.*

33. *Id.* at 344.

34. GEORGE M. FREDERICKSON, *RACISM: A SHORT HISTORY* 61-68 (2002).

slavery, crediting their claim via Biblical literalism raises theological problems. Although it is true that apologists for slavery used the literal words of the Bible to construct a pro-slavery ideology, it does not mean that Christianity, itself, was racist. As Rodney Stark points out, sacred texts are subject to the interpretive work of theologians. The Catholic theologians of the middle ages working with the same Biblical texts reasoned that slavery was wrong. It was the mistaken focus of the Protestant denominations on the “Word” that contributed to Christianity’s apparent support of racism. Taylor’s reliance on Biblical literalism is further undermined if the key portion of the Hebrew Bible that Taylor uses as a proof-text—*Genesis* 9:25—“Cursed is Canaan; a slave of slaves shall he be to his brothers”—is interpreted as a Jewish text.<sup>35</sup> In the rabbinic tradition the type of person “descended” from Canaan is cursed in the sense “that from birth the Canaanites will be steeped in the culture of slavery and not seriously desire freedom.”<sup>36</sup> Thus, just as Taylor relies on the Christian category of sin to posit the condition of humankind, so the Jewish tradition casts the descendants of Canaan as the type of humans who choose subjection to others (and to anything other than the will of God). These persons are thus not fully human since they have foregone freedom of will, the essential aspect of human beings.<sup>37</sup> While Biblical terms can be used by apologists of one stripe or another, it is a trap to say that Biblical religion—whether Christian or Jewish—is inherently racist. It takes an ideology to turn a Biblical text into a justification for racism.<sup>38</sup>

Professor Taylor uses his own experience with the United Farm Workers (UFW) to illustrate how theology can inspire a person to fight against racism. Yet his experience also showed him the danger when faith is transformed into doctrine and religion loses its inspiration. Taylor links this insight to law by asking how any organization can retain its inspiring vision without bureaucratizing the values that gave it birth. In this part of the article, Professor Taylor draws on his suspicion that a reliance on a legal rights strategy is not enough to

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35. (Revised Standard) (these are the words of Noah).

36. THE CHUMASH: THE STONE EDITION 45 (Nosson Scherman ed., 1993).

37. It should be noted that in *Leviticus* 25:39-46, the Bible gives laws for both Jewish and non-Jewish slaves without any consideration for the slaves’ connection to Canaan (and a Jewish slave could not be descended from Canaan in any event).

38. The idea of slavery and redemption is a dominant motif in the Hebrew Bible. It appears in other contexts: the American revolutionaries accused the British of seeking to impose “slavery” on them; nineteenth century socialists blamed the capitalists for “enslaving” the proletariat; and the Southern slavery apologists indicted the North for imposing “wage slavery” on its workers.

overcome racism. Yet, he recognizes the symbolic value that rights have for African Americans and their potential to call society's practices into question.<sup>39</sup>

In the last section of the article Taylor applies to law the insights his experience with the UFW gave him. Here he explores how the concept of civil religion imports aspects of religion into law. Americans have developed a "faith-like" attitude towards law and their legal institutions. Yet, as Taylor warns, this faith (which is often caricatured as "ceremonial deism")<sup>40</sup> carries with it the same danger that the confusion of faith and doctrine brings to religion. Faith that turns into doctrine may cost an organization its inspiring vision, turning it into a bureaucratic entity. Professor Taylor's caution about civil religion is warranted. Organized religion in American society best serves as a counter-cultural force that can draw on its moral traditions to call secular society to account. It is to this role that Professor Silecchia addressed her remarks.

### III. SILECCHIA

In her talk at the symposium, Professor Silecchia examined the role religious groups play in the process of law-making. Using Catholic social teaching as a model, she explores how religion can contribute to policy formation.<sup>41</sup> From its moral base, religious groups are especially able to present the claims of the underrepresented, pressing the state to follow its own ideals. Professor Silecchia argues that religions that seek to play a role in policy development must do so as a counter-cultural force. By standing outside the political process, religious groups can function as both advocates of social policy and critics of the secular order. She realizes that it is only from a counter-cultural position that religion can influence the state without being co-opted by it. Thus, religious groups must take a position that is self-limiting if they wish to influence government policy. Her argument is similar to Alexis de Tocqueville's observation that in America, religion "takes no direct part in the government of society" and his warning that "the church cannot share the temporal power of the state

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39. Taylor, *supra* note 25, at 64 (citing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 154 (1991)).

40. *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

41. See Lucia A. Silecchia, *Faith in the Public Square: Reflections on its Role and Limitations from the Perspective of Catholic Social Teaching*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 69 (2006).

without being the object of a portion of that animosity which the latter excites."<sup>42</sup>

Professor Silecchia shows how the Church's natural law tradition necessarily puts it in a critical stance vis à vis the positivist legal order of the modern secular state. In elaborating how the Church can call democracy to account, she uses the example of papal encyclicals that set forth the Church's view of social and economic policy. The Church also serves its counter-cultural function by educating the laity. An energized laity can press these policies on public officials. To the extent that Catholic social thought is carried into public policy, however, it raises concern over the influence of religion on policy, an issue addressed by numerous scholars.<sup>43</sup> The issue is whether legislators can rely on their personal religious views in making policy. Although the American public is split on the issue of overt reliance on religion in law making, the courts have been vigilant in assessing legislative motive. Most recently, local school board decisions that added "intelligent design" to the biology curriculum prompted judicial intervention.<sup>44</sup>

Professor Silecchia is correct in asserting that it is only when legislators couch their decisions in moral terms that they can withstand the charge of sectarianism. For example, President Bush justified his recent veto of funding for embryonic stem cell research on non-religious grounds although it is widely believed that the basis for his decision was religious in nature. In his veto announcement, Bush stated that the bill crossed "a moral boundary that our decent society needs to respect."<sup>45</sup> His veto message did not implicate religion but stated that the bill would "manipulate human life and violate human dignity."<sup>46</sup>

As long as religious doctrine can be translated into morally-neutral language, religion can play a significant role in policy-making. This holds true for both religious figures and politicians. In his article,

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42. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 317, 321-22 (Phillips Bradley ed. 1945) (1835).

43. See, e.g., MICHAEL J. PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* (2003); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

44. See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005); *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D.Ga 2005), *rev'd and remanded*, 449 F.3d 1320 (11th Cir. 2006).

45. Charles Babington, *Stem Cell Bill Gets Bush's First Veto*, WASH. POST, July 20, 2006, at A4.

46. M.E. Sprengelmeyer, *Stem Cell Veto Isn't End, DeGette Vows*, ROCKY MOUNTAIN NEWS (Denver, Colo.), July 20, 2006, at 4A.

Professor Gildin uses same-sex marriage to test his theory. Although opinion research clearly shows that persons with strong religious views are far more likely to oppose same-sex marriage, even this issue had to be translated into moral, sociological, or historical arguments.<sup>47</sup>

After Professor Silecchia asserts the role for Catholic social teaching, she cautions that it would be a mistake for the Church to spend too much of its resources on public-policy making. Silecchia points out that religion must be careful to avoid over-reliance on law and to avoid an alliance with any one party. Thus, Professor Silecchia recognizes the danger when religion enters the public arena and opens itself to the kind of attacks that arise in policy debates. Ultimately, religion's views may be seen to rely on faith, and the public arena does not respect arguments based on faith. Pushed to defend itself, religion will run the danger of having to rely on a "just because I believe" argument. Silecchia thus retreats to the position that Catholic social thought can provide principles but not details.

#### IV. CONCLUSION

In the three articles that are the subject of this comment the authors explore different aspects of the relationship between religion and law. In a modern secular nation with a strong religious tradition, such as the United States, the boundary between law and religion will necessarily be contested. This has been especially true in recent years, as public policy debates focused on issues of family and morality. We have seen the tension between law and religion grow as religion seeks to influence policy, believing that government has encroached on religion's domain. In this regard, Professor Taylor warns us that religion may not always be a positive force for good. In the wrong hands, religious doctrine may be twisted to support unwise social policies. On the other hand, Professor Silecchia reminds us that particular religious traditions can offer much to public debate if done carefully. But no matter how cautiously religion makes its case, the pressure of majority religious opinion in the legislatures may threaten novel religious expression. Professor Gildin cautions us that minority religions may be too optimistic if they rely on courts to protect them

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47. See e.g., *Hernandez v. Robles*, 3 No. 87 3 No. 89 (N.Y. June 6, 2006). Judge Smith interpreted New York's Domestic Relations Law of 1909 to reflect the "universal understanding" and "rational legislative decision" that marriage applies only to opposite-sex couples. *Id.* at 2, 5-8.

from legislative encroachment. In this regard, one is reminded of Madison's warning that "parchment barriers" are "not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."<sup>48</sup> In the United States the protection of religion relies equally on a normative tradition of toleration that captures Locke's insight: since "everyone is orthodox to himself," freedom of religious expression—"a concernment for the interest of men's souls"—should remain outside the purview of the state.<sup>49</sup>

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48. THE FEDERALIST NO. 10, *supra* note 17; THE FEDERALIST NO. 48, at 333, 338 (James Madison) (Jacob E. Cooke ed., 1961).

49. John Locke, *A Letter Concerning Toleration* (William Popple trans.) (1689), in JOHN LOCKE, A LETTER CONCERNING TOLERATION 14, 17 (John Horton and Susan Mendus, eds., 1991).

